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The Court of Appeal of England has recently decided a very interesting question in the law of negligence—Englehart v. Farraut, 1 Q. B. 240. The defendant employed a man to drive his cart with instructions not to leave it, and a boy, who had nothing to do with the driving, to go in the cart and deliver parcels to the defendant's customers. The driver left the cart, with the boy in it, and went into a house. While the driver was absent the boy drove on, and came into collision with the plaintiff's carriage. The plaintiff sued the defendant for the damage caused by the collision; and the court held, on appeal, that there is no rule of law that will prevent a master being liable for negligence of his servant, in consequence of which a third person is given opportunity to commit a wrongful or negligent act immediately producing the damage complained of; that it is in each case a question of fact whether the original negligence was an effective cause of the damage; and that in this case the negligence of the driver in leaving the cart was the effective cause of the damage, and the defendant was liable.

The doctrine that where a municipal corporation is wholly void *ab initio*, as being created without warrant of law, it can create no debts, does not apply to the case of an irregularly organized corporation, which has obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody except the State acting by direct proceedings. Such an organization is merely voidable, and, if the State refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but they devolve upon the new corporation which succeeds by operation of law to the property and improvements of its predecessor, though the new corporation, includes less territory than the old. This is the substance of the decision of the Supreme Court of the United States in the recent case of Shapleigh v. City of San Angelo. The conclusion of the court is in harmony with previous cases. In Broughton v. Pensacola, 93 U. S. 266, it was held that where a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking, in its new organization, the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are presumed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the right of property of the corporation in its old form should accompany the corporation in its reorganization. So a change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities. Mt. Pleasant v. Beckwith, 100 U. S. 520.

In Mobile v. Watson, 116 U. S. 289, 6 S. C. Rep. 398, it was held that when a municipal corporation with fixed boundaries is dissolved by law, and a new corporation is created by the legislature for the same general purposes, but with new boundaries, embracing less territory, but containing substantially the same population, the great mass of the taxable property, and the corporate property of the old corporation which passes without consideration and for the same uses, the debts of the old corporation fall upon the new as its legal successor; and that powers of taxation to pay them which it had at the time of their creation, and which entered into the contracts, also survive, and pass into the new corporation. There are other cases declaring the same views. See 1 Dill. Mun. Corp. (4th Ed.) § 172.

NOTES OF RECENT DECISIONS.

EVIDENCE — CRIMINAL PRACTICE — JUDGMENT IN CIVIL ACTION.—In State v. Bradneck, 37 Atl. Rep. 492, decided by the Supreme Court of Errors of Connecticut, it was held

that the judgment for defendant, in an action by a husband against his wife for divorce for adultery, is not admissible in a prosecution of the husband for neglecting to support his wife, in which he sets up as an excuse, and offers evidence to show, the same acts of adultery alleged in the divorce suit. The court said they thought it clear "that in admitting this evidence the court below erred. That criminal sentences are not evidence in civil issues has been often held, the reason being that the parties to a criminal prosecution and those in a civil suit are necessarily different, and the objects and results of the two proceedings are equally diverse. See Betts v. New Hartford, 25 Conn. 185; Whart. Ev. 777. So the converse of this rule, namely, that a judgment in a civil action is not admissible in a subsequent criminal prosecution, is equally true. Thus, for example, a judgment recovered against a defaulting tax collector and his sureties, in a civil action at the suit of the county, was held not competent evidence against them in a prosecution on the criminal side afterwards instituted for the default. Britton v. State, 77 Ala. 202. So, in Riker v. Hooper, 35 Vt. 457, a former judgment in a civil action was held not conclusive in a penal action between the same parties, though the same question was litigated in both actions, because the measure of proof is different in the two actions. The only case upon which the State relied, in argument before us, as holding a different doctrine, is that of Dorrell v. State, 83 Ind. 357. This was a prosecution for the unlawful removal of a fence from land; and it was there considered that a judgment in a former civil action between the defendant and the prosecuting witness, rendered before the commission of the alleged trespass, whereby the disputed boundary line between their respective lands was defined and settled, was admissible in evidence. But the court here also recognized the general rule that civil judgments are not admissible in criminal prosecutions, but decided as it did because it thought that the establishment of the boundary line was one of the "legal consequences" of the judgment, to prove which, as well as the fact of its rendition, a judgment is always admissible, even against strangers. The error to which we have referred, in admitting the evidence in question, was not relieved by what the court stated to the jury, to the effect that such evidence was not conclusive, but merited serious consideration. As was held by this court in Town of Bethlehem v. Town of Watertown, 51 Conn. 494: "A judgment is conclusive or is nothing. If not conclusive, there is no rule by which courts can measure and determine its effect."

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.—In People v. Lewis, 48 Pac. Rep. 1088, decided by the Supreme Court of California, it was held that a person attacked in his own house is not necessarily obliged to retreat in order to justify killing his assailant. The following is from the opinion reversing a judgment of conviction of manslaughter:

Upon the law of self-defense, the court instructed the jury as follows: "The defendant is not necessarily justified because he actually believed that he was in imminent danger. When the danger is only apparent, and not actual and real, the real question is: Would a reasonable man, under all the circumstances, be justified in such belief? If so, the defendant will be so justified. If this was defendant's position, it was his right to repel the aggression, and fully protect himself from such apparent danger. If he could have withdrawn from the danger, it was his duty to retreat. Between his duty to flee and his right to kill, he must fly, or, as the books have it, must retreat to the wall. But by this is not meant that a party must always fly, or even attempt flight. The circumstances of the attack may be such, the weapon with which he is menaced of such a character, that retreat might well increase his peril. By 'retreating to the wall' is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted and the necessity of slaying his assailant avoided. If the attack is of such a nature, the weapon of such a character, that to attempt a retreat might increase the danger, the party need retreat no further."

. . . . . .

But, whatever diversity of opinion may be found in the books upon the general proposition of the duty of retreat, the right to stand one's ground when assailed in one's own home or upon one's own premises was never seriously questioned, even by the common-law writers. Thus, in East's Pleas of the Crown, page 271, it is said: "A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger." Likewise, in Foster's Crown Law, chapter 3, p. 273, it is said: "In case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation, or property against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit known felony upon either. In these cases he is not

obliged to retreat, but may pursue his adversary till he findeth himself out of the danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable." In Wharton's American Law of Homicide, Philadelphia, 1855, at page 233, the author quotes from 1 Hale, P. C. 486: "In such a case, A, whether he be a householder or a lodger, being in his own house, need not fly as far as he can, as in other cases of *se defendendo*, for he has the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by his flight." Russell on Crimes (volume 1, ch. 3, sec. 2) enunciates the same rule, while Wharton (10th ed. sec. 502) thus declares: "When a person is attacked in his own house, he need retreat no further. Here he stands at bay, and may turn on and kill his assailant, if this be apparently necessary to save his own life. Nor is he bound to escape from his house in order to avoid the assailant. In this sense, and in this sense alone, are we to understand the maxim that every man's house is his castle. An assailed person—so we may paraphrase the maxim—is not bound to retreat out of his house to avoid violence, even though a retreat may be safely made." The supreme court of this State, in People v. Payne, 8 Cal. 341, recognized the rule, and, without further quotation from authorities, it is sufficient to refer to the cases of Beard v. U. S., 150 U. S. 550, 15 Sup. Ct. Rep. 962; State v. Cushing (Wash.), 45 Pac. Rep. 145; Willis v. State, 43 Neb. 102, 61 N. W. Rep. 254, and State v. O'Brien (Mont.), 43 Pac. Rep. 1091, where a multitude of authorities will be found collated.

CORPORATIONS — PARTNERSHIP WITH INDIVIDUALS—ILLEGALITY.—The Court of Civil Appeals of Texas decides in Sabine Tram Co. v. Bancroft, 40 S. W. Rep. 837, that a corporation organized under the laws of Texas cannot enter into partnership with individuals; that Rev. St. 1895, art. 651, subd. 7, empowering corporations to enter into contracts essential to transaction of their authorized business, does not confer the right to enter into a contract of partnership; that a corporation cannot sue for breach of an illegal contract of partnership between it and individuals to recover as damages the probable profits which would have accrued had the partnership been continued until the time fixed for its termination; and that where defendants entered into a contract of partnership with a corporation for manufacture and sale of logs, defendants to furnish and operate a sawmill and the corporation to furnish the logs, the corporation could not recover, on defendant's refusal to receive the logs and operate the mill, since the entire contract was vitiated by the illegality of the partnership. The court says in part:

The general rule is well established that a corporation cannot enter into partnership with other corporations or individuals. Whittenton Mills v. Upton, 10 Gray, 582; Railroad Co. v. Smith, 76 Ala. 572; Davis v. Railroad Co., 131 Mass. 259; 1 Mor. Priv. Corp. § 421; 6 Thomp. Corp. §§ 5838, 6026; Hirschl, Corp. pp. 113, 114. In the Whittenton Mills-Upton Case the Supreme Court of Massachusetts says: "There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If, then, this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property." In Massachusetts, as in Texas, it was provided that the directors should have the management and control of the affairs of the corporation, and the court proceeds: "It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation and bind it by its acts. In so doing he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will." A corporation has no more powers than are granted expressly or by implication from its charter, which is dependent upon the law of the State authorizing the creation of corporations, and prescribing their powers, duties, and liabilities. To permit corporations to enter into contracts which would practically destroy their identity, and create other managers and agents for them than those provided by law, would be contrary to public policy, and subversive of the laws of their creation. The law authorizing the organization of corporations in Texas details the objects for which they may be created, gives the limit of their duration, makes a specific grant of their powers, and prescribes their duties, naming the officers through and by whom they shall be controlled and governed, and provides that no corporation "shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation." There is no provision in the statute that would give a corporation the authority to hide itself in a partnership, obscure its identity, shift its responsibilities, place its management in the hands of persons foreign to the law of its creation, and cripple its power to perform the duties incumbent upon it. It is true that in prescribing the powers of corporations, in subdivision 7, art. 651, Rev. St. 1895, the power is given "to enter into any obligation or contract essential to the transaction of its authorized business," but that power does not confer the right to enter into contracts contrary to public policy and inconsistent with the object of the creation of the corporation. The contracts into which it may enter are those "essential to the transaction of its authorized business." Not all contracts that may advance its interests, or add to its prosperity or wealth,—for contracts entirely foreign to the end of its creation might accomplish those things,—but to enter into all contracts necessary to carry on the business and further the enterprise for which it was chartered, by the means and machinery provided by the law of its existence. As said in an English case (East Anglian Rys. Co. v. Eastern Counties Ry. Co., 11 C. B. 811), and cited with approval by the Supreme Court of the

United States: "What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be the object or prospect of success, they are still but a corporation for the purpose of making and maintaining the Eastern Counties Railway; and, if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority." Thomas v. Railroad Co., 101 U. S. 82. We conclude that the partnership formed between appellant and appellees was unauthorized by the statute, and contrary to public policy, and, while those parts of the contract which have been executed should be enforced between the parties, no enforcement of the unexecuted part of it can be properly demanded. Parish v. Wheeler, 22 N. Y. 494; Thomas v. Railroad Co., above cited. The suit, in this case, does not relate to any matters that arose between the parties before the dissolution of the illegal partnership, but the cause of action is the probable profits that would have accrued to appellant had the partnership been continued. The suit is to recover damages for non-performance of a contract unauthorized by law and obnoxious to public policy. The damages claimed arose from a failure to further prosecute an illegal enterprise. The law does not wield its power to prevent persons or corporations from withdrawing from illegal combinations, but rather encourages repentance and reform, even though at a late hour. When the illegal contract has ended by the acts of either party to it, future consequences resulting from the infraction will not subject the party to a suit for damages, but the parties will only be held responsible for those parts of the contract already executed. "The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case." Swan v. Scott, 11 Serg. & R. 155, cited by Thomp. Corp. § 6024. Applying this test to appellant's case, it must necessarily fall through, because it is based entirely upon the illegal contract of partnership.

EFFECT UPON GENERAL CREDITORS OF DEEDS OR MORTGAGES WITHHELD FROM RECORD.

What right has a general and subsequent creditor to attack mortgages or deeds of his debtor withheld from record, and which was executed before the debt was created? The writer proposes to examine the cases upon this question, but limits the inquiry to those instances where no statute defines the right of such a creditor. So, too, does he limit the examination to those cases where no statute was involved, declaring that the deed or mortgage should not take effect until recorded. Such cases have no place in this inquiry. And he further limits the inquiry to general creditors of the debtor, by which is meant those at least who have no specific liens on the lands or chattels mortgaged or executed, placed thereon or given therefor subsequent to the date of the mortgage or conveyance withheld. The inquiry will, however, embrace subsequent judgment creditors who have acquired a lien on the land. It must be borne in mind that, as between the mortgagor and mortgagee, or a grantor and grantee, a mortgage or deed is valid, though never recorded; and we are aware of no statute which declares an unrecorded deed or mortgage invalid as between the parties to it. How does such a mortgage or deed affect subsequent general creditors of the mortgagor or grantor, where no statute declares it shall be void as to them unless recorded? That is the question for examination. It is quite evident that this question may be materially affected by several factors entering into it. One of these is, was there an understanding or agreement between the mortgagee and mortgagor, or grantor and grantee, that the mortgage or deed should be withheld from record; and what was the object of withholding it, a lawful or an unlawful one? Another is, did the general creditor extend to the mortgagor or grantor credit before he knew of the execution of the mortgage or deed? A still further question, did the creditor, after he had secured his judgment, change his position? For instance, by purchasing the property under an execution issued thereon? Whether or not the debts were *bona fide* is not a question for inquiry in this article; for it is assumed that all claims have a valuable consideration for their creation, and that no part of them is fictitious. In Indiana, a statute provided that "every conveyance or mortgage of lands, or any interest thereon, shall be recorded in the recorder's office of the county where such lands shall be situated; and every conveyance or mortgage not so recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration."[1] Suit was brought to foreclose a mortgage against the plant of a lumber company, and its assignee resisted the foreclosure. He set up as a defense that the mortgage was given for a pre-existing debt at the time when the company was greatly indebted to creditors others than the mortgagee; that at that time it had a good credit; that its indebtedness would soon mature, and it

[1] R. S. 1881, Sec. 2931.

expected to renew it; that it represented to the mortgagee if the mortgage was recorded the effect would be to destroy its credit, prevent it obtaining an extension of the time for the payment of its then existing indebtedness, and also prevent it from making further purchase of material; that it was then insolvent; that it was necessary to secure such extension and to make such purchase in order to carry on its business; that it did secure such extensions and purchase other goods upon the belief that its plant was unincumbered, and that the mortgagee expressly entered into an agreement to withhold the mortgage for the purpose of enabling it to obtain an extension of its indebtedness and making further purchases. There was no charge that the mortgagee knew at the time he took the mortgage and entered into the agreement to withhold it from the record that the lumber company was insolvent; nor was there any charge that the mortgage was withheld for the purpose of defrauding the then existing creditors or those contracting with the company thereafter. It was also charged that the mortgagee knew that the several mercantile companies of the country would report the condition of the lumber company as it appeared of record, and that if the mortgage was placed of record, that fact would be so reported, and prevent the lumber company securing an extension of its debt or making further purchases. The mortgage was recorded two days after the company made an assignment for the benefit of its creditors. In passing upon the questions involved in the case, the court held that as the creditors represented by the assignee were neither "subsequent purchasers or mortgagees" they did not come "within the classes against whom the instrument is, by statute, declared to be fraudulent and void," and that it could not "extend the terms of the statute so as to include general creditors in the classes of persons against whom unrecorded mortgages are to be deemed, as an inference of law, fraudulent and void, for that would be legislation." The court declared "that in the absence of express fraud, the mere failure to record the mortgage within the time fixed in the recording act will not, as against the creditors of the mortgagee, either prior or subsequent, render it invalid." The court then proceeds "to determine whether the failure to record the mortgage will, when taken in connection with the agreement to withhold the same from record, and the other facts stated in the answer, make such a showing of fraud as to either invalidate the mortgage or postpone its lien to the claims of some of the creditors represented by the assignee," and, after stating that the question of fraud in that State is made "a question of fact," reaches the conclusion that the answer was insufficient, for the reason that it did not aver that the mortgage was executed or kept of record "with intent to defraud existing or subsequent creditors," and for the further reason that it was not shown that when the mortgage was executed the lumber company was insolvent, or that the mortgagee knew of its insolvency. The court considered that the facts narrated above were only badges of fraud. "We are satisfied," said the court, "that the arrangement for the withholding of a mortgage from record is not of itself sufficient to justify a court in holding, as a matter of law, such mortgage fraudulent and void as to creditors, either existing or subsequent; but that it is a badge of fraud to be considered with all the other facts and circumstances surrounding the transaction in determining whether or not there was, in fact, a fraudulent intent."[2]

But there are other cases where the court is not controlled by a statute requiring fraud to be found as a question of fact, and when a fraudulent intention on the part of the vendor or vendee, or mortgagor or mortgagee, is not essential. In Kentucky, there is an instance of this kind,[3] and so, too, in North Carolina.[4] In a Maryland case, it was held that a party cannot be permitted to take a bill of sale or mortgage of chattels from another for his own security, leave the mortgagee in possession, and ostensibly the owner, and at his request, and to keep the public from knowledge of its existence, withhold it from record for an indefinite period,

[2] Hutchinson v. First National Bank, 133 Ind. 271, 30 N. E. Rep. 952. The court cited, as supporting the language quoted, Folsom v. Clemence, 111 Mass. 273, and Stewart v. Hopkins, 30 Ohio St. 502. The case of Adams v. Curtis, 137 Ind. 175, 36 N. E. Rep. 1095, is not one so much of a wife permitting her husband to hold the title to her real estate and contracting debts on faith of such ownership, as it is that he was the actual owner and not she.

[3] Hildeburn v. Brown, 17 B. Mon. 779. In this case, however, the mortgage had to be recorded to be valid as against purchasers or creditors.

[4] Hafner v. Irwin, 1 Ired. L. 490.

renewing it periodically, and then receive the benefit of it by placing the last renewal upon record, to the prejudice of others, whom the possession and ostensible ownership of that very property by the mortgagor have induced to confide in him. The mortgage was declared void.[5] A case has been decided in the Supreme Court of the United States which is a step further than the first case cited in this article. There the mortgagee not only concealed the fact that he had taken the mortgage, but he actively represented that the debtor was worthy of credit; and parties relying thereon loaned him large sums of money. The court was careful to say that the law favored the vigilant creditor, and "that the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien on the property described in the mortgage. But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage which covers the mortgagor's entire estate, and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give credit to the mortgagor, who fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor."[6] Another case we call attention to presents still another question. A husband made a deed of land directly to his wife. The deed bore date March 23, 1857, but was not filed for record until December 2, of the same year. On the 21st of the following January, he, professing to act for his wife, sold the land to a third person. The creditors of the husband, who contracted debts with him before the deed was recorded, attached the unpaid part of the purchase money in the hands of the vendee, and between him and the wife a contest arose on the question which had the better right to the proceeds of the sale. The court, in delivering its opinion, said: "There is another aspect to the case not at all favorable to the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity, she is met with the fact that she asserted no right under it, in fact concealed its existence until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by the husband. Even if the deed was delivered on the day of its date, the suppineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches."[7]

In a New Jersey decision, the court stated the case as follows, and laid down the rule it considered the proper one in such instances: "The defendant's case must stand or fall upon the bare fact that complainant's cashier, having a mortgage given to himself to secure himself for endorsing the maker's note to be discounted by the complainant, and so, in effect, given to secure the complainant directly, refrained, at the request of the maker, to place it on record until after the maker had become indebted to another person, such other indebtedness not being in the mind of either at the making of the mortgage, and the cashier having no knowledge or suspicion of the maker's solvency. In order to postpone such a mortgage to one executed and recorded subsequent to its record, it is necessary to hold the mortgage itself void as against such subsequent mortgage creditor. In order to do that, it is necessary to find that the mortgagee was guilty of what is known as actual fraud as distinguished from constructive fraud; for it is well-settled that a conveyance or mortgage made or given for full and valuable consideration, can only be impeached by another creditor on the ground of actual fraud, in which the grantee or mortgagee has himself participated." In this case one Jones, president of a bank, borrowed money from his bank, and one Dunham, his brother-in-law and cashier of the bank, took a mortgage from him to secure the payment of the note for the money borrowed. This mortgage was left off the record and concealed for eleven years. In the meantime the complainant, Dunham and three others

[5] Gill v. Griffith, 2 Md. Ch. 270.

[6] Bennerhassett v. Sherman, 105 U. S. 100.

[7] Coates v. Gerlach, 44 Pa. St. 43. The three following cases may be regarded as taking an extreme view of the subject: Smith v. Craft, 17 Fed. Rep. 705; Stockgrowers' Bank v. Newton, 13 Colo. 245, 22 Pac. Rep. 444; Root v. Harl, 62 Mich. 420, 29 N. W. Rep. 29.

became surety on Jones' bond as guardian of one Stryker. There was an agreement between Jones and Dunham that the mortgage should not be placed on record, because it would injure Jones' credit. The note was repeatedly renewed or extended. Jones testified that Dunham "was not to place the mortgage on record without notice to me," and that the knowledge of its existence was to remain between him and me—we were to say nothing about it;" that neither himself nor, as far as he knew, Dunham ever told any one of its existence. He further testified that "I suggested to Dunham that as I was president of the bank, it would, perhaps, injure my credit." The reason assigned for requiring notice to be given of an intention to record the mortgage, was to enable Jones to make other arrangements; and it was stated at the time that he executed the mortgage he was doubtful of his solvency, although his credit was good; and that during the time the mortgage was withheld from record Jones told no one whatever, and intimated to no one that he was unable to pay all he owed. The mortgage was upheld.[8] One of the things noticeable in the decisions is, that no difference is made between the concealment of a deed and the concealment of a mortgage, or the withholding of them from record.[9] Thus, where a grantor had four hundred thousand dollars worth of property, besides the tract in dispute, and ten months before his failure he conveyed the tract of land to his wife, who did not record the deed until the day before her husband, the grantor, failed, it was held that the transaction was valid, no intention to defraud anyone having been shown.[10] So where a husband having little other property than that conveyed, conveyed a tract of land to his wife two years before it was recorded, and no intention to defraud was shown, it was held that there was no fraud, although the creditors of the husband knew nothing of the conveyance, she not having induced them to trust him.[11] So where a husband conveyed land to his wife, and she did not record the deed until after a third person purchased a judgment against the husband, the purchaser relying upon his seeming ownership of the land, it was held that she could claim the land as against the purchaser of the judgment.[12] Ignorance on the part of the grantee of the law requiring a deed to be recorded, is no excuse, if he resides in the State where the land lies. Thus, where a wife failed to record the deed her husband made her, he, as soon as the conveyance was made, having entered upon a hazardous business, it was held that she could not set up her ignorance of the law as an excuse for not recording the deed.[13] But where a creditor, residing in the State where the land did not lie, took a deed as a mortgage to secure his claim against the grantor, it was held that he might show his ignorance of the law of that State requiring a deed to be recorded, and such ignorance was sufficient to rebut any presumption of a fraudulent intention.[14] There are some quite early cases which seem to hold that the mere withholding of the deed from record, coupled with a retention of possession by the grantor, is sufficient evidence of fraud to set aside the conveyance as to subsequent creditors who knew nothing of the transaction. Indeed, it would seem that in an early English case no statute required a recording, and the mere retention by the grantor, who was the father of the grantee, of the possession was sufficient to overturn the conveyance.[15] Thus, where a son, who was a trader, made to his father an absolute deed for his land, intended as an indemnity, which was held up and not recorded for six years, during which the son continued to trade, and after his insolvency the deed was recorded; it was held that the creditors of the son might subject the land to their demands, even though the father might

[8] Flemington National Bank v. Jones, 50 N. J. Eq. 244, 24 Atl. Rep. 928; affirmed 27 Atl. Rep. 636.

[9] In the same line see the strong case of Day v. Goodbar, 69 Miss. 687, 12 South. Rep. 30, criticising Hilliard v. Cagle, 46 Miss. 309.

[10] Blanks v. Klein, 53 Fed. Rep. 436, 2 U. S. App. 363, 3 C. C. A. 585.

[11] Nadal v. Britton, 112 N. Car. 180, 16 S. E. Rep. 914; Lemert v. McKibben, 91 Iowa, 345, 59 N. W. Rep. 207; Allender v. State (Iowa), 70 N. W. Rep. 115; Danner Land, etc. Co. v. Stonewall Ins. Co., 77 Ala. 184; Thouron v. Pearson, 29 N. J. Eq. 487; Campbell v. Remaly (Mich.), 70 N. W. Rep. 432.

[12] Morris v. Ziegler, 71 Pa. St. 450. This case is not at variance with Coates v. Gerlach, 44 Pa. St. 43; Northwestern Forwarding Co. v. Mahaffey, 36 Kan. 152, 12 Pac. Rep. 705.

[13] Seals v. Robinson, 75 Ala. 363.

[14] Tryon v. Flournoy, 80 Ala. 321.

[15] Hungerford v. Earle, 2 Vern. 261; Turback v. Marbury, 2 Vern. 510; Worseley v. DeMattos, 1 Burr. 467, 483; Blackman v. Preston, 123 Ill. 381, 15 N. E. Rep. 42; Hildreth v. Sands, 2 Johns. Ch. 35; Bank of U. S. v. Housman, 6 Paige, 526.

be entitled to indemnity for suretyship and advances under the deed as mortgagee.[16] But if the grantee take possession of the premises, then it is a matter of indifference whether he record his deed or not, or even if he conceal it, for every one is charged with notice of the title by which he holds possession, and must make inquiry before relying upon the alleged ownership of the grantor.[17] The same rule prevails where the mortgagee takes possession.[18] Another thing to be observed is, that there must be, according to the later and better reasoned cases, an intention to perpetrate an actual fraud, either upon the person injured or upon the public generally, and that the withholding or concealment is a mere badge of fraud. The larger number of cases hold to this view of the subject.[19] An agreement, however, to withhold a deed or mortgage from record, so as to enable the grantor or mortgagor to secure credit, is of itself, as a rule, sufficient to avoid the conveyance or mortgage, if anyone relying upon the appearances is thereby misled and becomes a creditor of such grantor or mortgagor. The mere agreement to withhold the instrument from record is not sufficient; it must be done with an intent to aid or maintain the debtor in his financial credit.[20] And an agreement to withhold the instrument from record, with no intention of maintaining the debtor's credit, is not sufficient, unless it should be brought to the grantee's or mortgagee's notice that the debtor was obtaining credit upon the general appearance of his ownership of the property, or upon its apparent unincumbered condition, whereupon it would be his duty to at once put his deed or mortgage on record.[21] Secrecy is not of itself a fraud, but it gives force to other evidence tending to show a fraudulent agreement. As, for instance, that it was to be held off record until the debtor escaped, or until suit be threatened. In such an instance, secrecy is a part of the consideration, and it relates back to the inception of the transaction.[22] But it is not all the cases that take this view of the subject, as some of the quotations already made show. Thus, absolute deeds given by one banking house to another as security for loans and discounts, and withheld from record for three years, so as to not injure the debtor's credit, was held to be fraudulent as to subsequent creditors as a matter of law, the proofs of these facts raising a presumption of fraud.[23] But where an insolvent debtor made a conveyance of his real estate to his creditors, for the purpose of securing an indebtedness, and they withheld the conveyance from record, with an honest belief that their indebtedness would be paid, and without any agreement or understanding with the debtors that the conveyance should be withheld, for the purpose of benefitting their grantors in some way, it was held that

[16] Scrivener v. Scrivener, 7 B. Mon. 374.

[17] Tutwiler v. Montgomery, 73 Ala. 263; King v. Levy (Va.), 22 S. E. Rep. 492.

[18] State v. Flynn, 56 Mo. App. 236.

[19] Barker v. Smith, 12 N. Bank Reg. 474, 2 Woods, 87; First National Bank v. Jaffray, 41 Kan. 694, 19 S. C. Pa. Rep. 626; Hildreth v. Sands, 2 Johns. Ch. 35; Seals v. Robinson, 75 Ala. 363; Tutwiler v. Montgomery, 73 Ala. 263; Blackman v. Preston, 123 Ill. 381, 15 N. E. Rep. 42; Donner Land, etc. Co. v. Stonewall Ins. Co., 77 Ala. 184; Tryon v. Flournoy, 80 Ala. 321; Mobile Savings Bank v. McDonnell, 87 Ala. 736; Steurbach v. Leopold, 50 Ill. App. 476; Nadel v. Britton, 112 N. Car. 180, 16 S. E. Rep. 914; Lemert v. McKibben, 91 Iowa, 345, 59 N. W. Rep. 207; State v. Flynn, 56 Mo. App. 236; Curry v. McCauley, 20 Fed. Rep. 583; Dravo v. Fabel, 25 Fed. Rep. 116; Montgomery v. Phillips (N. J.), 31 Atl. Rep. 622; King v. Levy (Va.), 22 S. E. Rep. 492; Blanks v. Klein, 53 Fed. Rep. 436, 2 U. S. App. 363, 3 C. C. A. 585; Day v. Goddard, 69 Miss. 687, 12 South. Rep. 30; Thouron v. Pearson, 29 N. J. Eq. 487; Central National Bank v. Frame, 112 Mo. 502, 20 S. W. Rep. 620; State Bank v. Doran, 109 Mo. 40, 18 S. W. Rep. 836; Thomas v. Kelsey, 30 Barb. 268; Northwestern Forwarding Co. v. Mahaffey, 36 Kan. 152, 12 Pa. Rep. 705; Banner v. Robinson (Tex. Civ. App.), 34 S. W. Rep. 355; First Nat. Bank v. Rohrer (Mo.), 39 S. W. Rep. 1047; Collins v. Corwith (Wis.), 69 N. W. Rep. 349; Michigan Trust Co. v. Bennett (Mich.), 64 N. W. Rep. 330.

[20] Central National Bank v. Frame, 112 Mo. 502, 20 S. W. Rep. 620; State Bank v. Doran, 109 Mo. 40, 18 S. W. Rep. 836; Jewett v. Sundbock, 5 S. Dak. 111, 58 N. W. Rep. 20; Montgomery v. Phillips (N. J.), 31 Atl. Rep. 622; Standard Paper Co. v. Guenther, 67 Wis. 101, 30 N. W. Rep. 298; Sanger v. Guenther, 73 Wis. 354, 41 N. W. Rep. 436; Evans v. Laughton, 69 Wis. 138, 33 N. W. Rep. 573; Klein v. Richardson, 64 Miss. 41, 8 South. Rep. 204; Ackerman v. Ackerman (Neb.), 69 N. W. Rep. 388; Dobson v. Snider, 70 Fed. Rep. 10; Snouffer v. Kinley (Iowa), 64 N. W. Rep. 770.

[21] Sternbach v. Leopold, 50 Ill. App. 476; affirmed 156 Ill. 44, 41 N. E. Rep. 51.

[22] *Id.* See Montgomery v. Phillips, 53 N. J. Eq. 203, 31 Atl. Rep. 622.

[23] State Savings Bank v. Buck, 123 Mo. 141, 27 S. W. Rep. 341. See also Liddle v. Allen, 90 Iowa, 738, 57 N. W. Rep. 603; Falkner v. Lineham (Iowa), 55 N. W. Rep. 443; Mull v. Dooley, 89 Iowa, 312; Sanger v. Guenther, 73 Wis. 354, 41 N. W. Rep. 436. For cases upholding the validity of secret judgment notes and preferences obtained by means thereof, see Flemington National Bank v. Jones, 50 N. J. Eq. 224, 24 Atl. Rep. 928, affirmed 27 Atl. Rep. 636, and Illinois Steel Co. v. O'Donnell, 156 Ill. 624, 41 N. E. Rep. 185, affirming 53 Ill. App. 314.

the conveyance was not fraudulent as to the other creditors because it was not recorded, the mere withholding not being sufficient evidence of fraud.[24] In determining whether or not there was an intention to secure an undue advantage over those relying upon the "appearance of things," the kind of business the grantor or mortgagor is about to, or has engaged in, is subject for consideration. Especially is this true if he be a trader, and the more hazardous the business the stronger is the presumption of unfair dealing on the part of the grantee or grantor withholding from the record the instrument securing his debt or claim.[25] If the grantee or mortgagee has no knowledge of the business his grantor or mortgagor is engaged in, then the presumption of fraud is largely, if not quite rebutted; but if he remain wilfully ignorant, when he could readily have ascertained the character of his grantor's transactions, then his ignorance may be taken as the equivalent of actual knowledge. And here the subject of the communication between the grantor or mortgagor becomes material. If they were such as put a reasonably prudent man on guard, then such grantee or mortgagee must act and see that none are misled by the appearance of things. And here the grantee or mortgagee may rely upon the assurance of his grantor or mortgagor that he is not taking advantage of the present situation in order to secure for himself credit he could not otherwise secure, unless notice is brought to his attention that his grantor is attempting to deceive or mislead him, when it becomes his duty to act. In one case representations of the grantor concerning his condition, not made in the presence of his grantee, and without his knowledge, were admitted, no objection to their admission apparently having been made.[26] On the contrary, it has been held that the grantee was not chargeable with a fraudulent intent, by reason of the fact that his grantor attempted to conceal the contents of the deed when his acknowledgment to it was taken.[27] Where a mortgage is given that is withheld from record until the mortgagor has made purchases he could not have made if it had been of record, the cancellation of that mortgage and the giving of a new one will not place the mortgagee in any better position than he held under the first mortgage.[28] On the other hand, it has been held that an unrecorded mortgage, recorded after several renewals and within the time allowed by the statutes for the recording of mortgages, is not void as against simple creditors, whose indebtedness was incurred in the meantime, unless it was withheld for the fraudulent purpose of upholding the credit of the debtor, or is otherwise impeached by proof of actual or positive fraud on the part of the mortgagee.[29] An agreement, however, on the part of the debtor to give a mortgage if he become insolvent, does not render a mortgage given in pursuance to the contract invalid; for such an agreement is not required by law to be recorded, and if recorded, would not constitute notice to anyone.[30] There is an evident distinction between an instance where a deed or mortgage has been executed, and an instance where one is to be executed, if it be necessary to protect the creditor; for, in the first instance, the creditor has it within his power, without the consent of the debtor, to at once place his deed or mortgage on record and protect himself; while, in the second instance, it is entirely within the option of the debtor to protect the creditor, and a prior agreement cannot render the deed or mortgage invalid, unless there was an arrangement that the debtor was to contract debts, being enabled to enter into them by reason of the

[24] First National Bank v. Jaffray, 41 Kan. 694, 21 Pac. Rep. 242.

[25] Seals v. Robinson, 75 Ala. 363; Bacon v. Harris, 62 Fed. Rep. 99; Scrivener v. Scrivener, 7 B. Mon. 374; Flemington National Bank v. Jones, 50 N. J. Eq. 244, 24 Atl. Rep. 244; Stewart v. Hopkins, 30 Ohio St. 502; Central National Bank v. Doran, 109 Mo. 40, 18 S. W. Rep. 836; Stockgrowers' Bank v. Newton, 13 Colo. 245, 22 Pac. Rep. 449; Standard Paper Co. v. Guenther, 67 Wis. 101, 30 N. W. Rep. 288; Evans v. Laughton, 69 Wis. 138, 33 N. W. Rep. 573; Bacon v. Harris, 62 Fed. Rep. 99; Blackman v. Preston, 123 Ill. 381, 15 N. E. Rep. 42.

[26] Dravo v. Fabel, 25 Fed. Rep. 116; Blackman v. Preston, 123 Ill. 381, 15 N. E. Rep. 42. See Nadel v. Britton, 112 N. Car. 180, 16 S. E. Rep. 914.

[27] Tryon v. Flournoy, 80 Ala. 321. Evidence of the representations of the grantor or mortgagor, made after the execution of the instrument, are clearly not admissible, unless it be shown that the grantee or mortgagee authorized him to make them, or knew he would make them, or was doing so. For the grantee or mortgagee has the right to rely upon the presumption that his grantor or mortgagor would tell the truth and not mislead those applying to him for information.

[28] Bacon v. Harris, 62 Fed. Rep. 99.

[29] Mobile Savings Bank v. McDonnell, 87 Ala. 736, 6 South. Rep. 703. *Contra*, Griffith v. Gill, 2 Md. Ch. 270.

[30] Fecheimer v. Baum, 43 Fed. Rep. 719; Day v. Goodbar, 69 Miss. 687, 12 South. Rep. 30.

unincumbered condition of his property, and then, after they were created, protect this creditor by giving him a deed or mortgage. Such an arrangement would be an actual fraud, although frequently practiced.[31]

A question analogous to the one above discussed, if in fact not at one with it, is the secret transfer of stock without any official record having been made of such transfer. Thus, where the owner of stock transferred it on the books of the corporation, and had certificates issued to his transferee, and at the same time the transferer and transferee entered into a secret agreement, stipulating that the transfer was made without consideration, and that the transferer should remain the owner of the stock, and the transferee died insolvent, it was held that the transferer could not assert his title to the stock as against the creditors of the deceased, whose claims had been contracted on the faith that the latter owned the stock.[32] It is a question of speculation (for we are aware of no decisions in point) just how far the report of commercial agencies concerning the financial *status* of a creditor, who has given a deed or mortgage, which has not been recorded, may affect the grantee or mortgagee. These agencies "have become vast and extensive factors in modern commercial transactions for furnishing information to retail dealers and jobbers, as well as to wholesale merchants. The courts are bound to know judicially that no vendor of goods at wholesale can be regarded as a prudent business man, if he sells to a retail dealer upon credit without first informing himself through these mediums of information of the financial standing of the customer, and the credit to which he is fairly entitled."[33] Several of these associations have an agency in every town or city of any commercial importance throughout the United States for the benefit of their patrons or subscribers. As is well known, they make a practice of notifying their patrons or subscribers concerning all deeds and mortgages of men or partnerships in commercial business filed for record in the public offices, and will furnish such information concerning any particular creditor to any person not a subscriber upon the payment of a consideration. If a mortgage or deed has been executed and not recorded, they would not, of course, report it, unless brought especially to their attention. In those States where a statute declares that fraud is a question of fact, and must be found by the court or jury before the deed or mortgage can be set aside or postponed as to general creditors misled to their injury by a failure to record it, the reports of such agencies not showing the execution of the deed or mortgage are not of themselves sufficient, but at best are only evidence to be considered along with other evidence tending to show a fraudulent intent. In a State where the courts adjudge, as a matter of law, that certain acts are fraudulent, then as the court might hold the failure to record a deed or mortgage so that it could be reported by these agencies to be a fraud upon general creditors, but it certainly would be going a long way to do so. Where the grantee or mortgagee has, by statute, a certain length of time within which to record his deed or mortgage, even as against subsequent and innocent grantees or mortgagees, then it is clear that a failure to record within that time could not even be deemed a fraud of any character whatever, unless coupled with actual words of misrepresentation, or by silence when called upon to speak or act; and the mere fact that the grantee or mortgagee knows that his deed or mortgage will not be reported by these agencies, cannot, in the least, affect him. For it cannot be insisted that such agencies' records are an addendum to and a part of the public records. A thing to be considered in this connection is,

[31] Where a mortgage was given more than two months before the institution of bankruptcy proceedings, and not recorded until a few days before this institution, the statute avoiding all mortgages given within two months before bankruptcy proceedings had been begun, it was held that the statute had no application to such mortgage, and that it was valid, unless actual fraud be proven. Curry v. Cauley, 20 Fed. Rep. 583. Leaving a mortgage with the proper officer for record is the same as if it were recorded. Farobee v. McKerrihan, 33 Atl. Rep. 583; Holman v. Doran, 56 Ind. 358.

[32] In this case no fraudulent intent was shown, beyond the mere holding out of the deceased by the transferer, or permitting him to represent himself as the owner. Hirsch v. Norton, 115 Ind. 341, 17 N. E. Rep. 612. The case is properly modified by Hutchinson v. First National Bank, *supra*. That stock held in the name of a dummy is liable to be taken for the real owner's debt, see *Ex parte* Ord, 2 Mont. & A. 724; *Ex parte* Watkins, *Id.* 384, reversing same case, J. 693.

[33] Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. Rep. 103; Holmes v. Harrington, 20 Mo. App. 661; Eaton v. Avery, 53 N. Y. 31, 7 Am. Rep. 389. See the writer's article on "Commercial Agencies," 35 Amer. L. Reg. 31.

that these agencies often apply to men in commercial life for statements concerning their indebtedness and available property, including their liabilities secured by mortgages or trust deed; and it is an opportunity gladly embraced by many. The grantee or mortgagee undoubtedly has the right to assume that his grantor or mortgagor, when so applied to, will tell the truth and give correct information. He is not bound to assume that he will do otherwise. This fact, coupled with the further fact that transactions of a considerable amount are scarcely ever had without these special reports, render the evidence of a failure to report such deed or mortgage of slight value. Another thing must be considered. These reports are only rendered to patrons of the agency, either annual or special patrons. To one not a patron the agency owes no duty, for it is only to its patrons that the agency is liable in an instance of its negligence injuring a person relying upon the information furnished.[34] If, therefore, a customer of the grantor or mortgagor not a patron of the agency should rely upon a report not made to or for him, and the grantee or mortgagee had no knowledge that he was relying upon it before he had any dealings with the person about whom the report was made, it would seem clear that he could not insist that he had relied upon the agency's report, for the grantee or mortgagee is not bound to assume that he would thus obtain information which he was not entitled to. The fault is in himself, and not in the grantee or mortgagee.

W. W. THORNTON.

Indianapolis, Ind.

[34] See Crew v. Bradstreet Co., 134 Pa. St. 161, 19 Atl. Rep. 500, 25 W. N. Co.'s 538, 6 Pa. C. C. 360; Xiques v. Bradstreet Co., 70 Hun, 334, 24 N. Y. Supp. 48, 53 N. Y. St. Rep. 814. If the general creditor be not injured or misled by the appearances, he cannot complain. Durham Fertilizer Co. v. Hemphill (S. C.), 24 S. E. Rep. 85; Banner v. Robinson (Tex. Civ. App.), 34 S. W. Rep. 355.

SALE ON CREDIT—FRAUD BY BUYER—REPRESENTATION AS TO FINANCIAL ABILITY—INTENT NOT TO PAY.

BUGG v. WERTHEIMER-SCHWARTZ SHOE CO.

Supreme Court of Arkansas, April 10, 1897.

1. On an issue as to whether one was induced to sell goods on credit by the misrepresentations of the buyer as to his financial condition, the latter testified that before the sale he had made a correct statement of his finances to a third person, to whom he referred the seller for information. The seller did not deny that such statement was made, nor that it was correct, but claimed that he had no knowledge thereof at time of sale. Held, that the items of the statement were irrelevant.

2. A purchase of goods, with the intention not to pay for them, is a fraud which will entitle the seller to avoid the sale, though there was no false representations or pretenses.

3. Fraudulent misrepresentations as to the buyer's financial condition will entitle the seller to avoid the sale after delivery of the goods, though the buyer intended to pay for them.

Action in replevin to recover a lot of goods. The facts upon which the action was based are as follows: The firm of C. Tilles & Co. were, in the year 1892, carrying on a mercantile business in Ft. Smith, Ark. Dave Tilles was business manager, and made the purchases for the firm. In that year he purchased for the firm a lot of boots and shoes from George Millins, agent of Wertheimer-Schwartz Shoe Company, a corporation doing business in St. Louis, Mo. The contract for the purchase was made in Ft. Smith, but it was agreed that Dave Tilles should go to St. Louis, and select the goods before shipment. The lot selected was shipped in September, 1892. In December of that year said firm of Tilles & Co. failed in business, attachments were sued out against them by creditors, and under these attachments their stock of goods was seized, including a portion of the goods sold to them by Wertheimer-Schwartz Shoe Company. Afterwards said shoe company brought this action of replevin to recover said goods. Upon the trial the plaintiff introduced evidence tending to show that it was induced to sell the goods in question by material misrepresentations knowingly made by Dave Tilles to its agent, Millins, at Ft. Smith, said misrepresentations having reference to the financial condition of the firm of Tilles & Co. To contradict this testimony, the defendant introduced Dave Tilles as a witness, who denied that he had made such representations, and further testified as follows: "After making the contract with Millins, I went to St. Louis to select the goods, and at that time, before the goods were shipped, I offered to make to Mr. Wertheimer, president and credit man of plaintiff corporation, a full statement of the financial condition of Tilles & Co. Wertheimer replied by saying, 'You are all right, Tilles; I do not want any statement from you.' I had just made a detailed statement of the financial condition of my firm to Rice, Stix & Co., of St. Louis, whose place of business was near that of plaintiff; and when Wertheimer told me he did not wish any statement I informed him of the statement made to Rice, Stix & Co., and requested him to go and see it. This detailed statement was made orally by me to Mr. Stacey, credit man of Rice, Stix & Co., who took it down in writing, and read it to me as he wrote it. I did not sign it. It was a correct statement of the

firm's condition." The defendant then offered to read to the jury as evidence a copy of this statement, but the court refused to permit him to do so, and also refused to allow him to prove the contents of the statement by parol, on the ground that, the statement being in writing, the original statement was the best evidence of its contents, to which ruling defendant excepted. Wertheimer, testifying for plaintiff, denied that Tilles had offered to make any statement to him, and also denied that Tilles had informed him of the statement made to Rice, Stix & Co., or had any conversation with him in reference to said statement, and further testified that plaintiff had no knowledge of the existence of said statement until after the goods were delivered. The presiding judge instructed the jury at length upon the law of the case, but the charge, as well as the objections made thereto, can be sufficiently understood from the following extracts therefrom: "Instructions to the jury. This is a suit in replevin brought by plaintiff to recover of defendant a certain lot of goods seized and held by defendant as sheriff under levy of writs of attachment sued out against C. Tilles & Co. by certain creditors. * * * Now, the general rule of law is that if one induce another to sell goods on credit by false and fraudulent representations, or if one buys goods from another with the intent not to pay for them, the sale is fraudulent, and the seller has the right, as soon as he learns of the fraud, to rescind the sale, and recover back the goods, and that, too, even though the goods have been attached by another creditor of the buyer. * * * This case turns upon two questions: (1) Were the goods purchased by C. Tilles & Co. of plaintiff purchased with the intent at the time of purchase not to pay for them? or, secondly, was plaintiff induced to sell goods to C. Tilles & Co. by false and fraudulent representations of their agent? If, under the instructions to be given you as to each of these propositions separately, you find either of them in the affirmative, and if you find that the goods replevied in this action are a part of the goods so purchased by C. Tilles & Co., you will find for the plaintiff. Otherwise you will find for the defendant." Defendant duly excepted to the instructions given. There was a finding and judgment in favor of plaintiff.

RIDDICK, J. (after stating the facts): We are of the opinion that the judgment of the circuit court should be affirmed. The circuit court did not err in refusing to allow the appellant to prove the contents of the statement made by Tilles to Rice, Stix & Co., for the particular items contained in that statement were not relevant to the points in issue. "The most important class of facts which are excluded on the ground of irrelevancy," says Mr. Taylor in his work on Evidence, "comprises the acts and declarations either of strangers or of one of the parties to the action in his dealings with strangers. These—which, in the technical language of the law, are denominated '*res inter alios acta*'—it would be manifestly unjust to admit, since the conduct of one man under certain circumstances or toward certain individuals, varying, as it will necessarily do, according to the motives which influence him, the qualities he possesses, and his knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behavior of another man similarly situated, or of the same man toward other persons." 1 Tayl. Ev. § 317. The rule applies in this case. It was not competent for C. Tilles & Co., or those holding under them, to prove the declarations made by Tilles to Rice, Stix & Co. to support his testimony in this case, for these declarations did not tend to show that he had not made other and different statements to the agent of the shoe company, nor did they tend to throw any light on the matters in issue. The appellant was permitted to show by Tilles that he had made a correct statement of the financial condition of his firm to Rice, Stix & Co., and had informed Wertheimer, president of the shoe company, of this statement, and referred him to it for information concerning the firm. This was all appellant had the right to demand. Wertheimer, who testified in rebuttal for plaintiff, did not controvert the fact that Tilles had made such a statement, or deny that it was a truthful statement; but he denied that Tilles had informed him of such statement, or that the shoe company had any knowledge of the same when it sold the goods. The declarations in this statement, whether true or false, did not tend to contradict Wertheimer, and it was not proper to support Tilles by his own declarations made to third parties. As plaintiff did not controvert either the fact that Tilles had made a statement to Rice, Stix & Co., or that it was a correct statement, a majority of the judges feel convinced that the particular items thereof were irrelevant, and no prejudice resulted from the refusal to allow proof of the same. Railway Co. v. Donnelly, 46 Ark. 87; 1 Greenl. Ev. §§ 52, 448. The instructions given by the court were not erroneous. A purchase of goods by one who at the time intends not to pay for them is such a fraud as will entitle the seller to avoid the sale, although there were no fraudulent misrepresentations or false pretenses. If such intention were known to the vendor, it seems clear that he would not sell. The suppression, therefore, is a legal fraud upon the rights of the vendor, and entitles him to avoid the sale. Gavin v. Armistead, 57 Ark. 574, 22 S. W. Rep. 431; Taylor v. Mississippi Mills, 47 Ark. 247, 1 S. W. Rep. 283; Dow v. Sandborn, 3 Allen, 181; Benj. Sales (6th Ed.; Bennett's American Note) 442; Usher, Sales, § 274.

Nor can we sustain the contention of appellant that to entitle the vendor to avoid a sale after delivery it must in all cases be shown that the vendee did not intend to pay for the goods. That is, as above stated, one ground on which the sale may be avoided, but not the only one. If the vendee knowingly makes false representations

concerning material facts, and this induces the seller to part with his goods, the seller may elect to avoid the sale, and this without regard to whether the buyer intended to pay for the goods or not. The fraud in such a case consists in inducing the vendor to part with his goods by false statements of the buyer, known to be false when made, or made by him when he has no reasonable ground to believe that they are true. If a vendor parts with his goods on the faith of such false statements made by the buyer, it would be strange if the law permitted the buyer to reap the fruits of such conduct, and retain the goods against the will of the vendor. To illustrate, let us suppose a case. A man with no property, but with great faith in his ability as a merchant, goes to a city and calls on a wholesale merchant for the purpose of buying a stock of goods. He believes that if he can obtain a stock of goods his experience and ability will soon enable him to pay off the purchase price, but, fearing that the merchant may refuse to sell if he learns that he has no property, he thereupon, for the purpose of obtaining the goods, states to the merchant that he has money in the bank, and owns a large amount of both real and personal property. The merchant, ignorant of the facts, and relying on the truth of these statements, parts with his goods. He afterwards discovers the fraud, and brings an action to recover the goods. In such a case, would it be a valid defense for the buyer to say that, although he had secured the goods by misrepresentation, yet that he did honestly intend to pay for them? Clearly, it would not. The courts would answer such a question substantially as it was answered by the Supreme Court of Connecticut when it said that the intent of the buyer to pay "may have lessened the moral turpitude of his act, but it will not suffice to antidote and neutralize an intentionally false statement which had accomplished its object of benefiting himself and of misleading the plaintiffs to their injury." Judd v. Weber, 55 Conn. 267, 11 Atl. Rep. 40; Reid v. Cowduroy, 79 Iowa, 169, 54 N. W. Rep. 351, 18 Am. St. Rep. 359, and note; Strayhorn v. Giles, 22 Ark. 517. Counsel for appellant contend that a different rule was announced by this court in the case of Taylor v. Mississippi Mills, 47 Ark. 247, 1 S. W. Rep. 283. It is true that Mr. Justice Smith, who delivered the opinion of the court in that case, said that "in this class of actions the final test is a preconceived intention to get the goods without paying for them," but this expression must be taken in connection with the facts of that case and with the whole opinion. When so considered, we do not think that case is in conflict with the rule above announced. But if we should concede that these words of the learned judge were intended to convey the meaning imparted to them by counsel for appellant, still they could not affect the decision of this case, for general expressions of opinion by judges, however eminent, do not overturn well-settled rules of law. Finding no error, the judgment is affirmed.

NOTE.—*Right to Rescind a Sale for Fraud.*—The law is always ready to lend its assistance in relieving from fraudulent practices in buying property. If a purchaser induces his vendor to part with something of value, reserving the secret intent not to pay for same, the law brands such an act as fraudulent and gives to the confiding but misled seller the right to rescind the agreement. For it would be violent to presume that the vendor wishes to part with his property by a sale on a credit when the vendee is buying with the fixed though reserved intent never to make payment. The presumption in such instances is, rather, if the vendor knew of the secret, fraudulent design, he would not have parted with his property. And when he does so presuming, as he legitimately may, that the buyer is acting in good faith, he may rescind the contract and place himself *in statu quo* upon discovery of the fraud. Taylor v. Mississippi Mills, 47 Ark. 247; Oswego Starch Factory v. Lendrum, 57 Iowa, 573; Wood v. Boynton, 64 Wis. 265; Lee v. Simmons, 65 Wis. 523; Doane v. Lockwood, 115 Ill. 490; Smith v. Richards, 13 Pet. 626; Wiggin v. Day, 9 Gray (Mass.), 97; Ash v. Putnam, 1 Hill (N. Y.), 302; Fox v. Webster, 46 Mo. 181; Stewart v. Emmerson, 52 N. H. 301; Donaldson v. Farwell, 93 U. S. 631; First Nat. Bank v. Kinney, 47 Neb. 149. And the fact that the fraud by which the goods are bought is perpetrated by the agent of the vendee without his knowledge does not alter the case at all. The vendee would have either to ratify the act of the agent—which would be ratifying the fraud—or repudiate it. In either event, he would have no right to the property. Wheeler & Wilson Mfg. Co. v. Aughey, 144 Pa. St. 398; Meyershoff v. Daniels, 173 Pa. St. 555. Where it becomes necessary to show fraud in order to avoid or rescind a contract of sale, evidence of other like fraudulent transactions by the buyer is competent as tending to prove the fraud or strengthen any fraud proven. Bradley Fertilizer Co. v. Fuller, 58 Vt. 315; 1 Greenl. Ev. § 53; Eastman v. Premo, 49 Vt. 355; Chamberlin v. Fuller, 59 Vt. 247; Castle v. Bullard, 23 How. (U. S.) 172; Pierce v. Hoffman, 24 Vt. 525; Wiggin v. Day, 9 Gray (Mass.), 97; Lincoln v. Claflin, 7 Wall. 132; Hall v. Naylor, 18 N. Y. 588. But a contract of sale which may be rescinded for fraud must be repudiated within a reasonable time. Otherwise, the presumption will arise that the seller has elected to waive or condone the fraud. Chamberlain v. Fuller, 59 Vt. 247; Green v. Betts, 1 Fed. Rep. 289. And whether the rescission is made within a reasonable time or not, will generally be a question of fact. Chamberlain v. Fuller, 59 Vt. 247. Where the vendor promptly rescinds his contract of sale upon the discovery of the fraud, he is under no obligation to pay or tender to the vendee any money he may have paid out for freight or other like expenses incident to handling the property. Being guilty of a fraud in purchasing the property, he has no right to incumber it with burdens which the vendor would not have had to bear had no sale been made; but the vendor may exact the property in its entirety from the vendee and compel its delivery by appropriate remedies without paying or tendering to the fraudulent vendee such items as freight, insurance, drayage, etc. Chamberlain v. Fuller, 59 Vt. 247; Lee v. Simmons, 65 Wis. 523. Where the purchaser procures his goods through fraud, the vendor cannot be forestalled in the assertion of his right to repossess himself of the property by a sale of the goods to another who is cognizant of, or privy to, the fraud, or where the only consideration paid by such third party is an antecedent or pre-existing debt owing by him to the vendee of the original

seller. The third party in such a case is not a *bona fide* purchaser for value within the rule of law recognizing the rights of third parties who purchase in good faith and for value (Sleeper v. Davis, 64 N. H. 59); neither is an attaching creditor such a *bona fide* purchaser (Taylor v. Mississippi Mills, 47 Ark. 247; Goodwin v. Mass. Loan & Trust Co., 152 Mass. 189, 199; Buffington v. Garrish, 15 Mass. 156; Oswego Starch Factory v. Lendrum, 57 Iowa, 573; Bussing v. Rice, 2 Cush. [Mass.] 48; Clark v. Flint, 22 Pick. [Mass.] 231, 243; Thompson v. Rose, 16 Conn. 71; Wiggin v. Day, 9 Gray [Mass.], 97; Henderson v. Gibbs, 39 Kan. 679; Bidault v. Wales, 20 Mo. 546; Wollner v. Lehman, 85 Ala. 274); nor is an assignee of the vendee (Montgomery v. Bucyrus Machine Works, 92 U. S. 257; Wright v. McAlpin [Ky.], 35 S. W. Rep. 1039); nor one who parts with no other consideration than a pre-existing debt in purchasing from the vendee, though such purchaser be ignorant of the fraud. Root v. French, 13 Wend. 570; Bidault v. Wales, 20 Mo. 546; Ames Iron Works v. Kalamazoo Pulley Co. (Ark.), 37 S. W. Rep. 409. And the vendor may take the property from the attaching creditor or a third party, not a *bona fide* purchaser for value by process of replevin or other appropriate remedy the same as he could do directly from the purchaser. Sleeper v. Davis, 64 N. H. 59. Nor is it necessary that a demand be first made. Carl v. McGonigal, 58 Mich. 567; Oswego Starch Factory v. Lendrum, 57 Iowa, 573; Bussing v. Rice, 2 Cush. (Mass.) 49. If the vendor is unable to find the goods fraudulently bought, he may replevy such as are tangible, and sue in conversion for the value of the remainder. Sleeper v. Davis, 64 N. H. 59.

Of course, if the vendor has received any part of the purchase money he will not be permitted to rescind and reclaim the property gotten from him by the fraudulent purchase until he has paid back or tendered to the vendee any money or property he may have received as part payment. Schneider v. Foote, 27 Fed. Rep. 581; Dillman v. Madlehoffer (Ill.), 7 N. E. Rep. 88. Or if he has received the notes of his vendee as evidence of the indebtedness for the property, he must surrender these up before he will be permitted to assert his right to rescind. Doane v. Lockwood, 115 Ill. 490; Andrews v. Henster, 6 Wall. 254. Where a sale is made to a person who falsely and fraudulently represents himself to be a member of a firm which is solvent and entitled to credit, no title whatever passes by such transaction, and the vendor may reclaim the goods or recover for their conversion from the vendee or even an innocent purchaser from him for value. No sale is really made in such a case; the minds of the parties do not meet, and there is no contract by which the title to the property can legally be said to pass in any sense whatever. Rodliff v. Dallinger, 141 Mass. 1; Alexander v. Swachamer, 105 Ind. 81; Perkins v. Anderson, 65 Ill. 398. But if the fraudulent acts or statements are not relied upon by the vendor in making the sale there will be no ground for a rescission. Humphrey v. Merriam, 32 Minn. 197; Barringer v. Cobb, 58 Mich. 557. The reason of this is, it is the reliance upon, and deception by, the fraud that brands the agreement as fraudulent and gives the deceived one the remedy. But if, knowing of the fraud he makes the sale any way, he is no more injured than he would have been had the vendee fully disclosed the fraud. Fraud without injury is not recognized as a ground for complaint or relief of any kind. Ark. & La. Ry. v. Smith, 53 Ark. 275; Ewing v. Goode, 78 Fed. Rep. 442; Bradley v. Larkin (Kan.), 47 Pac. Rep. 315; Lake v. Tyree, 90 Va. 719; Thompson v. Crane, 73 Fed. Rep. 327, 334. This being true, a fraudulent representation which can have no material connection with or bearing upon the agreement, though relied on, is not ground for a rescission. Hull v. Johnson, 41 Mich. 286; Frenzel v. Miller, 37 Ind. 1; Irvine v. Kirkpatrick, 3 E. L. & Eq. 17; Smith v. Richards, 13 Pet. 26. But the fact that the buyer may believe his statements to be true will not deprive the vendor of his right to rescind if he relied upon them and they were material. The vendee must, at his peril, confine his representations of matters legitimately bearing upon the agreement to the truth. His ignorance of their falsity will not enable him to profit by the reliance placed in the supposed truth of the statements by the vendor. Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486; Seeberger v. Hobert, 55 Iowa, 756; Cooper v. Schlesinger, 111 U. S. 148. An affirmance of the contract of sale by proceeding to judgment against the vendee for the purchase price agreed to be paid will not preclude the vendor from rescinding the contract where the fraud which would entitle him to the rescission is not discovered until after judgment. Kraus v. Thompson (Minn.), 14 N. W. Rep. 266; Wright v. McAlpine (Ky.), 35 S. W. Rep. 1039.

When the election to rescind is once made the seller cannot thereafter, as a rule, sue on the contract, and when he elects to sue on the contract, he will not be permitted to rescind. His election with knowledge of all the facts, precludes him. Farwell v. Meyers, 59 Mich. 179; Bryan-Brown Shoe Co. v. Block, 52 Ark. 458; First Natl. Bank v. Kinney, 47 Neb. 149; Bach v. Tuch, 126 N. Y. 63; Kingsley v. McGrew (Neb.), 67 N. W. Rep. 787; Wachsmuth v. Sims (Tex. Civ. App.), 32 S. W. Rep. 821.

Where a person making a sale learns of the fraud of the vendee, before delivery and in time to save himself from the agreement, he will be required to assert his rights promptly, and if he nevertheless permits the property to get beyond his reach or negligently loses the opportunity of saving himself in any way he may, he will then be held to the contract. Whiting v. Hill, 23 Mich. 394, 405; Ash v. Putnam, 1 Hill (N. Y.), 302. Where a merchant makes a statement to a commercial agency as a basis of credit, this will amount to a proclamation to all sellers who rely upon the records of such agency for information about the solvency of the vendee, that the statement is true. And if a vendor relying upon such statement makes a sale to one to whom he would not have extended credit but for his faith in the truth of the statement and it is discovered afterwards that the statement is false, he will be entitled to rescind. Schram v. Strouse (Tex. Civ. App.), 28 S. W. Rep. 262; Gainesville Natl. Bank v. Bamberger, 77 Tex. 49. It will hardly be necessary to add that one who purchases property from a vendee who has obtained the same upon a contract superinduced by fraudulent statements or representations, will take a good title if he acts in good faith, and pays value. Bidault v. Wales, 20 Mo. 546; Donaldson v. Farwell, 93 U. S. 631; Friedman v. Boyd (Tex. Civ. App.), 31 S. W. Rep. 531; Sleeper v. Davis, 64 N. H. 59; Perkins v. Anderson, 65 Iowa, 398.

HUMORS OF THE LAW.

Judge Ray Bean of Langtry, Texas, was once trying a Mexican for stealing a horse, and his charge to the jury was one of the shortest on record: "Gentlemen of the jury, thar's a greaser in the box, and a hoss missing; you know your duty!" And they did.

"Now, your honor," argued the attorney in the court of Justice Brown, of Santa Rosa, "I move dismissal of this case on the ground that the *corpus delicti* has not been established."

Judge Brown rubbed his chin in a perplexed way, fixed his gaze on the ceiling for a moment, and then, clearing his throat, said: "Of course it is an old principle of law that the probator must correspond with the alligator, and in this case I am of the belief that the *corpus* is all right, but I don't know about the *delicti*."

"Your honor, I want that to go into the record," demanded the opposing counsel. "I want the record to show that your honor said the *corpus* is all right, but you do not know about the *deliciti*."

Judge Brown realized that he had blundered and sat staring at the attorney for a moment. Then, pulling himself together, he said: "All right, let that go into the record, but you fellows know danged well I was only joking when I said it, and that will go into the record, too."

Judge—"Prisoner at the bar, have you anything to say why sentence should not be pronounced against you?"

Prisoner—"Only this. I think you ought to hang the man the prosecution has been talking about; but the man my lawyer has told you about you ought to acquit, and beg his pardon for arresting him."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE — Accidental Death.—Where the insured was killed, when unarmed, by one M, the injury was accidental as to deceased if he did not know at the time, or had not reason to believe, M was armed with a deadly weapon, though deceased was advancing on M in a threatening manner.—UNION CASUALTY & SURETY CO. v. HARROLL, Tenn., 40 S. W. Rep. 1080.

2. ACCIDENT INSURANCE—Prepayment of Premium.—A provision in an accident policy that the same shall not take effect unless the premium is paid prior to an accident is waived, on a renewal of the policy, when, according to the usual course of dealing between the insurance company and its agent, the company transmits the renewal receipt to the agent, and charges him with the amount of the premium, and the agent then delivers it to the insured without exacting pre-payment.—FIDELITY & CASUALTY CO. OF NEW YORK v. WILLEY, U. S. C. C. of App., Third Circuit, 80 Fed. Rep. 497.

3. ADMINISTRATORS — Appointment — Collateral Attack.—One who has been recognized as the administrator of an estate, both by the court in which the administration was pending and by all parties interested in the estate, for a period of about 18 years, is conclusively presumed the legal administrator, when his acts are collaterally attacked.—HALBERT v. DE BODE, Tex., 40 S. W. Rep. 1011.

4. ASSIGNMENT OF CAUSE OF ACTION.—Under Rev. St. 1895, art. 4647, providing that, on sale of any cause of action, a written transfer thereof shall be recorded, which shall be notice to all parties, an agreement conveying to another one-half of whatever sum may be realized out of and collected from a certain defendant in the suit then pending is a sufficient transfer of one-half of the cause of action, within the statute.—TEXAS & P. RY. CO. v. VAUGHAN, Tex., 40 S. W. Rep. 1065.

5. ATTORNEY AND CLIENT — Compensation.—Where the undisputed evidence in a suit to recover attorney's fees under a written contract, and a further sum for services rendered, which were not contemplated by the contract, showed that defendant received the benefit of the extra services, and that they were worth the sum demanded therefor, a judgment for a less sum was erroneous.—CLARKE v. FAVER, Tex., 40 S. W. Rep. 1009.

6. ATTORNEYS — Misconduct — Disbarment.—The disbarment of the attorney for misconduct in his profession is of the class of inherent powers of courts recognized by this act of 1896, and the penalty for such misconduct prescribed.—STATE v. RIGHTOR, La., 22 South. Rep. 195.

7. BAIL — Liability of Sureties.—Sureties on a bail bond, who do not surrender the principal after his conviction and imprisonment on another indictment, are liable where he escapes and does not appear for trial on the charge on which such bond was given; Code, §§ 4427, 4429, providing that bail are bound for the appearance of the principal from day to day until he is discharged, and that they may at any time exonerate themselves by surrendering the principal.—STATE v. CROSBY, Ala., 22 South. Rep. 110.

8. BANKS—Certificates of Deposit.—A banking corporation organized under the general laws of this State has the power to make interest-bearing time certificates of deposit.—FRANCOIS v. LEWIS, Minn., 71 N. W. Rep. 621.

9. BANKS — Checks—Bona Fide Holders.—A bank which credited the amount of a check to the payees, and permitted them to draw against it before it received notice through the clearing house that the check had been dishonored, is a holder for value.—SHAWMUT NAT. BANK v. MANSON, Mass., 47 N. E. Rep. 196.

10. BANKS AND BANKING — Insolvency.—On proof of any act of insolvency on the part of a banking company organized under the banking laws of this State, or of non-compliance with any of the conditions of those laws, it shall forfeit its corporate rights; and the court, at the instance of any creditor, and on due proof of the alleged facts, shall decree a forfeiture, and appoint commissioners to effect the liquidation of the affairs of the corporation.—STATE v. BANK OF COMMERCE, La., 22 South. Rep. 207.

11. BILLS AND NOTES—Bona Fide Purchaser.—In an action on notes in the hands of an indorsee, evidence that, before plaintiff purchased them, he was informed that a note executed by the witness' firm was procured by fraud, is admissible on the question of good faith.—HYNES v. WINSTON, Tex., 40 S. W. Rep. 1025.

12. BILLS AND NOTES — Insurance Note — Transfer.—Where a premium note given to an insurance company provides that it is not negotiable, the fact that the company goes into liquidation, turning over its assets for that purpose to a trust company, does not constitute such a transfer as is prohibited by the terms of the note.—EQUITABLE INS. CO. v. HARVEY, Tenn., 40 S. W. Rep. 1092.

13. BILLS AND NOTES—Negotiability.—A note containing a stipulation permitting an extension of time of payment is not negotiable paper, under Rev. St. 1894, § 7520 (Rev. St. 1881, § 5506), providing that notes payable to order or bearer in a bank in the State shall be negotiable as inland bills of exchange.—MITCHELL v. ST. MARY, Ind., 47 N. E. Rep. 224.

14. BILLS AND NOTES — Negotiability.—A note given for rent, and "subject to any offset that may arise for repairs on a place is non-negotiable.—JONES v. LATWINN, Tex., 40 S. W. Rep. 1010.

16. BILLS AND NOTES—Promissory Note—Makers.—A complaint alleging that defendants A Co., S, and Z, by their joint note promised to pay, and making part of the complaint the note, reciting "we" promise to pay, and signed, "A Co. S, Pres. Z. Man.," states a cause of action against S and Z as individuals.—ALBANY FURNITURE CO. v. MERCHANTS' NAT. BANK, Ind., 47 N. E. Rep. 227.

16. BOUNDARIES—Presumptions—Acquiescence.—Evidence of undisputed occupation and fencing in accordance with a line for 30 years, not only of the lands in controversy, but of other parcels in the immediate neighborhood, raises a presumption that it is the true line.—WELTON v. POYNTER, Wis., 71 N. W. Rep. 597.

17. CARRIERS—Live Stock Shipments.—After plaintiff's cattle had been loaded on defendant's cars for shipment under a verbal contract, and the cars closed and sealed, defendant's agent presented a written contract binding the plaintiff to do certain acts, not required by the oral agreement, as a condition precedent to recovery in case of damage. Plaintiff had not time to read the contract before the train started, but, supposing it was a pass for a man to go with the cattle, signed it: Held, that the verbal contract controlled the shipment.—MISSOURI, K. & T. RY. CO. v. WITHERS, Tex., 40 S. W. Rep. 1073.

18. CARRIERS OF PASSENGERS — Negligence.—A railroad company is not liable for injuries to a passenger if there was no negligence in the operation or equipment of the train alleged to have produced the accident, and the accident was caused by latent and undiscoverable defects, or the interference of a stranger with its appliances.—WESTERN RY. OF ALABAMA v. WALKER, Ala., 22 South. Rep. 182.

19. CARRIERS OF PASSENGERS—Street Railroads — Injury to Passenger.—In an action to recover for injuries received by plaintiff while alighting from a street car, though the petition avers that the car was stopped for the purpose of allowing plaintiff to get off, he may recover on the hypothesis that it was stopped under such circumstances as to justify him in believing it was stopped for that purpose.—BELT ELECTRIC LINE CO. v. TOMLIN, Ky., 40 S. W. Rep. 925.

20. COMPOSITION AGREEMENT WITH CREDITORS.—A composition agreement with creditors, which embraces all debts not secured either by liens upon the debtor's property, or by personal sureties, or by parties bound as co-obligors, includes a debt on which the debtor was bound as surety for a firm which was then insolvent and had made an assignment; such claim being unsecured to the extent that it was not paid out of the estate of the principals.—WAKEFIELD v. FIRST NAT. BANK OF GEORGETOWN, Ky., 40 S. W. Rep. 921.

21. CONDEMNATION PROCEEDINGS — Damages — Evidence.—In condemnation proceedings by a railway company, though the opinion of defendant's witnesses as to the value of the land sought to be condemned was in part based on a recent sale of neighboring land, which was subsequently conveyed to officers of plaintiff, such testimony was not open to the objection that it showed what plaintiff had paid for other property in the neighborhood for its right of way where it did not appear what such officers had paid, or that the original purchaser bought for the railway, or that his vendor knew for what purpose the land was bought.—ST. LOUIS TERMINAL RY. CO. v. HEIGER, Mo., 40 S. W. Rep. 947.

22. CONSTITUTIONAL LAW — Municipal Corporations—Collateral Attack.—The constitutionality of Act providing the method of creating municipal corporations, and the organization of the municipal corporation under the act, cannot be attacked collaterally by the defendant, resisting a tax claimed by the corporation.—CHICAGO, ST. L. & N. O. R. CO. v. TOWN OF KENTWOOD, La., 22 South. Rep. 192.

23. CONSTITUTIONAL LAW — Shanty Boats — License Tax.—To require the payment of a license tax by persons residing on boats on navigable rivers in the State is within the police power of the State.—ROBERTSON v. COMMONWEALTH, Ky., 40 S. W. Rep. 920.

24. CONTRACTS — Damages—Profits.—Where the performance of a special contract involves the furnishing of both material and labor, and the contract is entire, and the breach total, loss of such profits as would have accrued from the contract as the direct result of its fulfillment may be recovered in an action for a breach thereof.—SILBERTEIN v. DULUTH NEWS-TRIBUNE & CO., Minn., 71 N. W. Rep. 622.

25. CONTRACT—Written Contracts—Parol Evidence.—Even after an oral contract of sale has been consummated by delivery of the article and the payment of the price, the parties may, if they choose, sign a writing expressing their contract, and parol evidence will then be inadmissible to show that the oral contract differed therefrom.—WROUGHT-IRON RANGE CO. v. GRAHAM, U. S. C. C. of App., Fourth Circuit, 80 Fed. Rep. 474.

26. CONVERSION — Evidence. — Where brokers hold stocks and bonds purchased through them by a customer for investment, awaiting payment by him of a balance due, with an express contract that they are not to transfer them to others, their possession is that of bailees, and a pledge thereof by them for their own benefit, or an assignment in payment of their creditors, is a conversion for which trover and conversion will lie.—CHEW v. LOUCHEIM, U. S. C. C. of App., Third Circuit, 80 Fed. Rep. 500.

27. CORPORATIONS — Appointment of Receivers.—An objection to the jurisdiction of the court to appoint receivers for any other property of a corporation than that upon which the complaining creditors claim a lien should be taken *in limine*, and is waived when not raised until after a decree authorizing receivers to sell all the corporate property.—TEMPLE v. GLASGOW, U. S. C. C. of App., Fourth Circuit, 80 Fed. Rep. 441.

28. CORPORATIONS—Purchase of Property by Issues of Stock.—When a corporation is organized to purchase several manufacturing plants from persons holding options upon them, the fact that the amounts in the stock of such corporation, at its par value, which are issued to the holders of such options, in payment therefor, are larger than the prices fixed on the plants in such options, is not evidence of overvaluation of the plants in the sale and in the issue of stock.—DICKERMAN v. NORTHERN TRUST CO., U. S. C. C. of App., Seventh Circuit, 80 Fed. Rep. 450.

29. CORPORATIONS—Stock—Payment.—Incorporators turned over to the corporation a plant worth $2,500 in payment for capital stock of $50,000, and the corporation issued, in addition to stock, $50,000 of bonds, and sold $25,000 of same to outside persons, and distributed the rest among the stockholders, who did not promise to pay anything therefor except as above: Held, that the stockholders were not liable to creditors of the corporation by reason of their holding the bonds.—ROMAN v. DIMMICK, Ala., 22 South. Rep. 109.

30. CORPORATIONS — Subscribers' Liability.—Where certain persons purchased land to be conveyed to a

corporation to be afterwards formed, and the corporation was to issue them stock at the rate of five dollars of stock for every dollar paid to the fund for purchasing the land, one of such persons, who became a director of the corporation and afterwards sold his stock and became a creditor of the corporation, could not, on its becoming insolvent, maintain a bill to compel the other subscribers to pay the difference between the face value of their stock and the value of the property conveyed. — NICROSI V. CALERA LAND CO., Ala., 22 South. Rep. 147.

31. COUNTIES—Divisions—Apportionment of Debt.—Const. art. 11, § 3, providing that every county created out of another county shall be liable for a just proportion of the existing debts of such county, does not empower the courts to determine such proportion; but it is for the legislature to do this, or determine the basis therefor.—TULARE COUNTY V. KINGS COUNTY, Cal., 49 Pac. Rep. 8.

32. COVENANT—Enforcement of Right of Easement.—A covenant that a building shall not be erected over a certain height is the grant of an easement, which can be enforced by injunction proceedings instituted by adjoining property owners.—BROWN V. O'BRIEN, Mass., 47 N. E. Rep. 195.

33. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—A paper is not inadmissible as a dying declaration because it does not itself show that deceased had no hope of recovery.—AUSTIN V. COMMONWEALTH, Ky., 40 S. W. Rep. 905.

34. CRIMINAL EVIDENCE—Manslaughter.—On prosecution for manslaughter, where the killing was done with a revolver, evidence of the concealment of same prior to the shooting is immaterial.—HENSON V. STATE, Ala., 22 South. Rep. 127.

35. CRIMINAL LAW—Assault.—Where, at the time of the difficulty, the parties were within a few feet of each other, and defendant's buggy was but a few feet away, and his pistol was lying on the seat, and he threatened the prosecutor, and reached for his pistol, and the prosecutor fled, it was an assault.—BODEMAN V. STATE, Tex., 40 S. W. Rep. 981.

36. CRIMINAL LAW—Assault with Intent to Rape.—A conviction for assault with intent to rape will be set aside where the conduct of defendant was consistent with an intent not to use force.—O'BRIEN V. STATE, Tex., 40 S. W. Rep. 969.

37. CRIMINAL LAW—Homicide—Defense of Self and Family.—Where defendant intruded into the home of a brother of deceased, and fired a pistol at the brother in the midst of the family, and the brother, in order to protect himself and others of the family, gave defendant a blow, whereupon defendant again fired at him, and killed deceased, the giving of the blow could not, in legal contemplation, have raised such a violent passion in defendant as to reduce what would otherwise have been murder in the first degree to manslaughter in the fourth degree.—STATE V. POLLARD, Mo., 40 S. W. Rep. 949.

38. CRIMINAL LAW—Homicide—Defense of House.—Where defendant was in his tenant's room, and, when deceased knocked on the door, opened it and ordered him to leave, and, on deceased's attempting to draw a pistol, shot him, an instruction that a man has a right to defend himself in his own house, and need not retreat, was properly refused, where the hypothesis of freedom from fault on defendant's part in bringing on the difficulty was omitted.—MEDLOCK V. STATE, Ala., 22 South. Rep. 112.

39. CRIMINAL LAW—Homicide—Manslaughter.—A defendant is guilty of manslaughter, only, where the deceased assaulted and struck him, and defendant did not reasonably believe his life was in danger, or that he was in danger of serious personal injury from the assault, but the blow caused him pain, and his anger was aroused, and he was rendered incapable of cool reflection, and killed the deceased on that account.—CASTRO V. STATE, Tex., 40 S. W. Rep. 985.

40. CRIMINAL PRACTICE—Gaming—Warrant.—A justice's warrant, whereon defendant is held for trial in the circuit court (Acts 1894-95, p. 252), for "gaming in a public place," issued on an affidavit to the same effect, does not describe an offense under Cr. Code, § 4052, prohibiting gaming at certain places with cards, dice, or similar devices, and section 4057, imposing an increased penalty if anything of value is played for.—MCGEE V. STATE, Ala., 22 South. Rep. 113.

41. DETINUE — Action against Receiver. — Detinue against a receiver appointed by the federal court cannot be maintained where such receiver was ordered to take charge of the property in controversy, took possession of it under the order, claims the same as in his possession as such receiver, and no order or leave to bring the action has been granted by the appointing court.—SOUTHERN GRANITE CO. V. WADSWORTH, Ala., 22 South. Rep. 157.

42. EQUITABLE LIEN—Improvements on Wife's Lot.—Where a husband agrees with his wife to erect improvements on her land, and to pay for the same, one selling lumber to the husband on his credit, and without intent to charge the wife thereby, cannot enforce an equitable lien against the land.—POE V. EKERT, Iowa, 71 N. W. Rep. 579.

43. EQUITY—Accounting Adequate Remedy at Law.—Complainant alleged that he contracted to sell to D certain fair grounds for a cash sum and one-third of the proceeds of all privileges incident to the holding of fairs, races, etc., that, after the conveyance and payment of the cash consideration D formed an association and held a race meeting, the receipts of which were very large, but that complainant did not know the actual amount, and was unable to ascertain the same, and that D had left the State, taking all the records of the association with him, without paying anything to complainant. The bill prayed for an accounting: Held, that there was an adequate remedy at law by action for money had and received, no confusion or complication of accounts being shown.—DARGIN V. HEWLITT, Ala., 22 South. Rep. 128.

44. ESTOPPEL.—A wife was authorized by the judge to contract a loan, and to mortgage her separate property. Her husband joins her in the act, aiding, authorizing, and assisting her. The mortgagee subsequently brings suit to subject the mortgaged property to payment of his claim. The husband intervenes, contesting the wife's full ownership of the property mortgaged, and averring his superior right over the seizing creditor to be paid out of the proceeds of her interest in the property on a claim of his own: Held, he cannot be heard to deny the creditor's right to collect his debt. His participation in the act of mortgage effectually estops him.—JOUBERT V. SAMPSON, La., 22 South. Rep. 203.

45. EVIDENCE—Injury to Passenger.—Where the issue in an action for killing plaintiff's intestate was whether, at the time of the injury, he was a passenger on defendant's train, evidence that a quarter of an hour before the accident he discovered that no electric cars were running on account of the storm, and that he left his house in a hurry, saying he was going to take defendant's train was admissible, as part of the *res gestæ*, to show intent to become a passenger.—INNESS V. BOSTON, R. B. & L. R. CO., Mass., 47 N. E. Rep. 193.

46. EXECUTION SALE — Mistake. — Where, by mutual mistake, a deed describes property other than that purchased, and the land described in the deed is sold on execution against the vendee, the sale is void; and equity cannot, at the instance of a grantee of a purchaser at the execution sale, correct the error so as to give him title to the land actually purchased by the vendee.—BURROWS V. PARKER, Oreg., 48 Pac. Rep. 1100.

47. FEDERAL COURTS—Concurrent Suits between Same Parties.—Suits between the same parties to quiet title to the same land are of such a nature that when one is pending in a State court, and the other in a federal court, and the State court first acquires jurisdiction by

service of process, the federal court should stay its hand until the cause in the State court is determined. But it should not dismiss the suit where the State court may leave some matters at issue undetermined, which may properly be adjudicated by the State court. —ZIMMERMAN v. SO RELLE, U. S. C. C. of App., Eighth Circuit, 80 Fed. Rep. 417.

48. FEDERAL COURTS — Jurisdiction.—A suit in which the complaint sets up an entry of public land by the plaintiff and the subsequent issue of a patent, and seeks to establish an interest in the land during the interval, by an application of the doctrine of relation, is a case of federal cognizance, since the determination of the applicability of such doctrine to the case requires the construction of federal statutes and a consideration of the effect of acts thereunder. — EVANS V. DURANGO LAND & COAL CO., U. S. C. C. of App., Eighth Circuit, 80 Fed. Rep. 433.

49. FEDERAL COURTS—Jurisdiction—Non-residents of District.—Rev. St. § 740, providing that, if there are two or more defendants residing in different districts of the State, the suit may be brought in either district, was not repealed, either expressly or by implication, by the provision in the judiciary acts of 1875 and 1887-88, that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant. — GODDARD V. MAILLER, U. S. C. C., S. D. (N. Y.), 80 Fed. Rep. 422.

50. FEDERAL OFFENSE — Larceny from Mails—Decoy Letters.—Criminal prosecutions for abstracting money from the mails may be based upon the taking of money from decoy letters mailed by post-office inspectors.— United States v. Jones, U. S. C. C., E. D. (Va.), 80 Fed. Rep. 513.

51. FRAUDULENT CONVEYANCE — Insolvency. — "Contemplation of insolvency," as used in Sanb. & B. Ann. St. § 1693*a*, declaring a conveyance by an insolvent debtor within 60 days prior to a voluntary assignment, and in contemplation of such assignment or of insolvency, etc., to be invalid, means an intention on the debtor's part to take advantage of the insolvent law, and does not refer to a mere expectation of inability to meet his obligations.—BARNES V. NATIONAL BANK OF OSHKOSH, Wis., 71 N. W. Rep. 602.

52. GARNISHMENT — Burden of Proof. — Where a fund deposited in bank was garnished, and the garnishee's answer alleged facts showing that the defendant depositor had acquired the fund in such a manner that it was not subject to payment of his debts, the burden was on plaintiff to prove the contrary. — SMITH V. MERCHANTS' & PLANTERS' NAT. BANK, Tex., 40 S. W. Rep. 1038.

53. HOMESTEAD—Extent of Right. — Under a claim of a homestead are included all outhouses, fences, and other improvements on the land claimed, unless they exceed the amount exempted. — WATTERSON V. E. L. BONNER CO., Mont., 48 Pac. Rep. 1108.

54. HOMESTEAD—Selection—Estoppel.—The fact that a mortgagor of land included in the mortgage his homestead, not then selected, as to which the mortgage was void, because not executed by his wife in the manner required by Code, § 2508, does not estop him from afterwards selecting a portion of the tract so mortgaged as a homestead. — MARKS V. WILSON, Ala., 22 South. Rep. 134.

55. INJUNCTION — Mutual Insurance Company — Payment of Fraudulent Claims. — A bill by policy holders in a mutual life insurance company to enjoin the payment of certain policies, which alleges that plaintiffs are each holders of policies in the company, contributing to its funds by assessments; that the company has accumulated a fund for the benefit of its policy holders, from which dividends are distributed; that such fund belongs to the members; and that plaintiffs are interested in such fund,—sufficiently shows that they were members of the company, and have such interests as entitle them to bring the action. — CARMIEN V. CORNELL, Ind., 47 N. E. Rep. 216.

56. INSURANCE — Conditions for Appraisement. — In the absence of a statute to the contrary, clauses in an insurance policy providing for an appraisement before suit is brought must be complied with by the assured before he can commence suit on the policy.— ZALESKY V. HOME INS. CO., Iowa, 71 N. W. Rep. 566.

57. INSURANCE—Ownership—Proof of Loss.—A policy on household goods described them generally by classes, and, among others, recited "sewing machines." The entire policy was to be void if the interest of assured was other than unconditional ownership. Among the goods was a sewing machine held by assured under an executory contract of purchase: Held, that the machine was not within the policy, and had no effect as to other property to which assured had full title. — COOPER V. INSURANCE CO. OF STATE OF PENNSYLVANIA, Wis., 71 N. W. Rep. 606.

58. INTERSTATE COMMERCE LAW — Rates.—The interstate commerce act governing shipments "from one State or territory to any other State or territory or from any place in the United States to an adjacent foreign country, or through a foreign country, to any other place in the United States," applies to a shipment to or from an unorganized territory.—MISSOURI, K. & T. Ry. Co. v. BOWLES, I. T., 40 S. W. Rep. 899.

59. INTOXICATING LIQUORS — Illegal Sale. — Where a county line ran through a town, and defendant, indicted for selling liquors in violation of the local option law of W county, proved that the building in which he sold it was in B county, he cannot be convicted, though the street on which he sold it had been regarded for election and taxpaying purposes as in the county of W. — HUTCHINS V. STATE, Tex., 40 S. W. Rep. 996.

60. JUDGMENT—Right of Heir to Revive.—A judgment ordering the sale of land to pay the plaintiff's debt cannot be revived by the plaintiff's heirs, though no administration has been granted, the heirs having no right to enforce the collection of debts due the ancestor. — WIGGINS' HEIRS V. CRACRAFT, Ky., 40 S. W. Rep. 907.

61. JUDGMENT AGAINST WIFE—Validity.—A judgment *in personam* against a wife on a debt contracted during marriage, where coverture is pleaded, is void.—FLANAGAN V. OLIVER FINNIE GROCER CO., Tenn., 40 S. W. Rep. 1079.

62. LANDLORD AND TENANT — Eviction. — There is no actual eviction of the lessee of the first floor of a building by the building being moved back to the other side of the lot, still retaining, however, the same number on the street, and a new building being erected on the former site; and he cannot, therefore, remain in possession without paying rent. — LEIFERMAN V. OSTEN, Ill., 47 N. E. Rep. 203.

63. LIBEL—Publication—Parties. — On publication of a libel, plaintiff is not obliged to join as defendants every person liable, and the liability of those sued is not affected by such non-joinder.—MUNSON V. LATHROP, Wis., 71 N. W. Rep. 596.

64. LIFE INSURANCE — Parties.—The surviving beneficiaries under a certificate were entitled to recover thereon against the insurer, though the administrator of the deceased beneficiary was not joined as plaintiff. —SUPREME LODGE KNIGHTS & LADIES OF HONOR V. PORTINGALL, Ill., 47 N. E. Rep 203.

65. LIMITATION — Amendment of Petition. — In a suit by an attorney to enforce a lien on land for services, as against a remote vendee of his client, an amended petition seeking to recover against the client's immediate vendee is properly rejected, as such claim should be enforced by an independent action. —MONTGOMERY V. TABB, Ky., 40 S. W. Rep. 906.

66. LIMITATIONS — Demand.—Where a demand is necessary before the commencement of an action, it must be made at least within the statutory period of limitations, since a person cannot extend the statute of limitations indefinitely by failing to make demand.—

MEHERIN V. SAN FRANCISCO PRODUCE EXCHANGE, Cal., 48 Pac. Rep. 1074.

67. LIMITATION OF ACTIONS.—Under Rev. St. 1895, art. 3369, providing that on the death of a person against whom there may be a cause of action limitations shall cease to run for 12 months unless an administrator is appointed, an action to cancel a deed as procured by fraud of deceased, otherwise barred within four years after discovery of the fraud, under Sayles' Civ. St. art. 3207, may be brought at any time within five years from such discovery.—GROESBEECK V. CROW, Tex., 40 S. W. Rep. 1028.

68. LOST INSTRUMENTS — Secondary Evidence. — Secondary evidence of the contents of a lease alleged to have been lost is not admissible without some preliminary proof that the original once existed.—WEILER V. MONROE COUNTY, Miss., 22 South. Rep. 188.

69. MANDAMUS TO JUDGE—Criminal Law.—*Mandamus* will lie to compel the judge of a city court to reinstate a criminal case which he has discontinued for reasons insufficient in law.—EX PARTE STATE, Ala., 22 South. Rep. 115.

70. MASTER AND SERVANT — Assumption of Risk.—Where defects connected with a service are obvious to a servant, and he voluntarily continues in the service without objection, he assumes the risk.—LOUISVILLE & N. R. CO. V. KEMPER, Ind., 47 N. E. Rep. 214.

74. MASTER AND SERVANT — Assumption of Risk.—Where a helper at a roundhouse knew of the existence of a hole in the turntable, and had noticed its location every night that he had worked there up to the time of the accident, and entered no complaint therefor, he assumed the risk of working on such defective turntable though he may have seen the bridge carpenter measuring it, there being no promise of repair.—COWLES V. CHICAGO, R. I. & P. RY. CO., Iowa, 71 N. W. Rep. 580.

72. MASTER AND SERVANT—Contributory Negligence.—Where a boy employed in a brick yard goes into a shed, and is injured by a revolving shaft, the employer is not liable therefor, where the duties of the boy did not require him to go into such building, and he had been warned of the danger of so doing.—MONFORTON V. DETROIT PRESSED-BRICK CO., Mich., 71 N. W. Rep. 986.

73. MASTER AND SERVANT—Personal Injury—Disregard of Rules.—Where an injury to a railroad employee is alleged to be due to a violation of a rule of the company, evidence that the employees habitually disregarded the rule, with the knowledge of the superintendent, is admissible to show abrogation thereof, without showing previous non-observance under conditions similar to those which existed at the time of the accident.—LAKE ERIE & W. R. CO. V. CRAIG, U. S. C. C. of App., Sixth Circuit, 80 Fed. Rep. 488.

74. MECHANIC'S LIEN — Enforcement. — A subcontractor invoking, in the same action, judgment against the contractors and foreclosure of his mechanic's lien, may have judgment of foreclosure, though unable to get personal service on the contractors, and therefore unable to get valid personal judgment against them.—O'ROURKE V. BUTTE LODGE, NO. 14, INDEPENDENT ORDER OF GOOD TEMPLARS, Mont., 48 Pac. Rep. 1106.

75. MECHANICS' LIENS—Property Held in Common.—Where a subscription contract for the construction of a building binds the subscribers to pay only the respective amounts subscribed by them, the interest of each being proportionate to his subscription, mechanics' liens for such construction accrue only against the undivided interest of each for the amount severally owing by him; Code 1886, § 3018, providing for a lien for work done by virtue of a contract with the owner to the extent of the interest owned by him.—HINES V. CHICAGO BLDG. & MANUFG. CO., Ala., 22 South. Rep. 160.

76. MECHANIC'S LIEN—Waiver by Taking Notes.—Where defendant advanced money to the owner of a building, and took a mortgage thereon while a contractor was erecting it, he was affected with notice of the contractor's lien, and the contractor was not estopped by taking from the owner notes for the amount thereof secured by mortgage on the building.—FARMERS' & MECHANICS' NAT. BANK OF FT. WORTH V. TAYLOR, Tex., 40 S. W. Rep. 966.

77. MINING—Locating Claim — Notice.—If one first discovering a vein or lode does not make a valid location thereon, another may make such location.—WILLEFORD V. BELL, Cal., 49 Pac. Rep. 6.

78. MORTGAGE—Assignment—Bona Fide Purchaser.—Where a note is acquired for value and in good faith before maturity, a deed of trust securing it, and which passes as an incident thereof, is, like the note itself, discharged from all equities existing between the original parties.—CRAWFORD V. C. AULTMAN, Mo., 40 S. W. Rep. 952.

79. MORTGAGE—Cancellation.—The rule for the cancellation of a prior and ranking mortgage on the ground that the inscription thereof has ceased to have effect, for want of proper or timely reinscription, is a familiar proceeding; but, in case the question upon which a duly-inscribed prior mortgage depends is simulation or fraud in the cause or consideration of the obligation secured thereby, the creditor is necessarily put to his revocatory or other action for relief.—BALDWIN V. BORDELON, La., 22 South. Rep. 196.

80. MORTGAGE — Foreclosure—Attorney's Fees.—To stop foreclosure of mortgage providing for payment out of proceeds of sale of a reasonable solicitor's fee, tender after bill filed should include an offer to pay reasonable fee for services already performed.—OAKFORD V. BROWN, Ill., 47 N. E. Rep. 202.

81. MORTGAGES—Foreclosure—Surplus—Where a first mortgage is foreclosed by a judicial decree, without the joinder of the second mortgagee, and a surplus results from the sale, the second mortgagee cannot elect to transfer his lien to the surplus, instead of following the regular remedy of foreclosure, subject to the rights held under the first mortgage.—MILMO NAT. BANK V. RICH, Tex., 40 S. W. Rep. 1032.

82. MORTGAGE — Receiver — Collection of Assets.—Pending foreclosure, a receiver of the mortgaged property was appointed, who also took possession of certain moneys of defendant then on hand, and collected others then due defendant, and used the same in the course of the receivership, though they were not subject to the mortgage lien: Held, that a judgment creditor of defendant was entitled to an order, as against the receiver, subjecting such funds, as the moneys of defendant, in part satisfaction of his judgment.—CALIFORNIA TITLE INSURANCE & TRUST CO. V. CONSOLIDATED TIEDMONT CABLE CO., Cal., 49 Pac. Rep. 1.

83. MORTGAGE FORECLOSURE—Counsel Fees.—On foreclosure by action, recovery cannot be had on default for counsel fees stipulated in the mortgage under a prayer for sale of the mortgaged premises, and application of the proceeds to the amount due, though the right to such counsel fees is averred in the complaint; Code Civ. Proc. § 580, providing that the relief granted on default cannot exceed that "demanded" in the complaint.—BROOKS V. FORINGTON, Cal., 48 Pac. Rep. 1073.

84. MUNICIPAL CORPORATION—Railroads in Streets.—After a railroad was constructed in a street of a city without authority, an ordinance was passed authorizing its construction. Subsequently legislative authority was for the first time conferred on the city to grant the power to construct railroads in its streets, and the city then passed an ordinance reciting the former ordinance and granting the company the right to construct double tracks under the same restrictions: Held, that the effect was to legalize the construction and operation of the railroad.—CITY OF OWENSBORO V. OWENSBORO & N. R. CO., Ky., 40 S. W. Rep. 916.

85. NATIONAL BANKS—Usury.—Under Rev. St. U. S. § 5198, the penalty for reserving usurious interest by the contract is the forfeiture of the entire interest, while the penalty where the interest has been actually paid is the liability in a separate action for twice the

amount thus paid.—MARION NAT. BANK v. THOMPSON, Ky., 40 S. W. Rep. 903.

86. PARTNERSHIP—Duties.—Under Civ. Code, §§ 2410, 2411, partners are bound to act in the highest good faith towards each other, and this continues and extends to the dissolution and liquidation of the partnership affairs.—WIESTER v. WIESTER, Cal., 48 Pac. Rep. 1086.

87. PLEADING—Demurrer—Supplemental Complaint. —Where, at the time of the filing of a supplemental complaint, there was no complaint on file, but it was out on demurrer, the supplemental complaint could not be the foundation of an action.—ELLIS v. CITY OF INDIANAPOLIS, Ind., 47 N. E. Rep. 218.

88. PLEADING—Statute of Frauds.—Under the code pleading, where an agreement is alleged in the answer which the statutes of frauds requires to be in writing, it will be presumed it was in writing, without an allegation to that effect.—BRADFORD INV. CO. v. JOOST, Cal., 48 Pac. Rep. 1083.

89. PLEADING — Verification of Plea — Waiver.—A plaintiff who makes no objection before trial waives the affidavit required by statute verifying the plea of part failure of consideration. — ASHCRAFT v. STEPHENS, Tex., 40 S. W. Rep. 1036.

90. PRINCIPAL AND SURETY—Application of Payments. —It is a general rule that a surety cannot direct the application of payments made by his principal and that he is bound by any application made by the principal, and the creditor, or either.—MERCHANTS' INS. CO. v. HERBER, Minn., 71 N. W, Rep. 624.

91. QUIETING TITLE—Pleading.—To authorize a judgment quieting title, plaintiff must allege and prove that he is in possession of the land.—COPPAGE v. GRIFFITH, KY., 40 S. W. Rep. 908.

92. RAILROAD COMPANY—Contributory Negligence.— Where one having control of a team is driving over a railroad track at a street crossing without looking or listening for trains, or, where there are obstructions rendering looking useless, without stopping to listen, it is contributory negligence.—MOORE v. CHICAGO, St. P. & K. C. RY. CO., Iowa, 71 N. W. Rep. 569.

93. RAILROAD COMPANY—Defective Depot Platform.— A railroad company is guilty of negligence where it allows a hole to remain in a platform which persons use in hauling and loading cotton for transportation over the lines of the railroad company.—FT. WORTH & N. O. RY. CO. v. NESMITH, Tex., 40 S. W. Rep. 1071.

94. RAILROAD COMPANIES—Injury to Person on Track. —To constitute willfulness on the part of servants in charge of a train, in their omissions to make proper preventive effort after discovering the peril of a person on the track, they must have been conscious at the time that they were omitting to use the means at hand which the circumstances reasonably required to avert an injury; and hence a count which merely charges a failure to exercise due and reasonable care, after discovering the peril, charges negligence only. — ALABAMA, G. S. R. CO. v. BURGESS, Ala., 22 South. Rep. 169.

95. RES JUDICATA—Garnishment.—Judgment on foreclosure by a wife of a mortgage on the homestead executed by her husband was not an adjudication against a judgment creditor of the husband as to the validity of the indebtedness, though he filed and afterwards withdrew an answer, as he had no lien on the premises under his judgment.—THOMAS v. MCDANELD, Iowa, 71 N. W. Rep. 572.

96. SLANDER — Charging Larceny. — To say to one, "You are a liar and thief, and I have the papers to prove it," charges larceny, and is actionable *per se*, unless the circumstances show that the words ought not to be understood in their ordinary sense.—YOUNGS v. ADAMS, Mich., 71 N. W. Rep. 585.

97. TAXATION—Personal Property — Sale before Lien. — Where one in whose name bank stock has been taxed sells it, or mortgages it for its full value, before personal taxes become a lien on personal property, and "take precedence of any sale, mortgage or other lien on such property" thereafter made, the tax cannot be collected of the purchaser or mortgagee.—ST. JOHNS' NAT. BANK v. BINGHAM TP., Mich., 71 N. W. Rep. 588.

98. TAX TITLES — Adverse Possession. — A husband while in joint occupancy of the wife's land with her cannot acquire a valid tax title as against her.—WARD v. NESTELL, Mich., 71 N. W. Rep. 593.

99. TELEGRAPH COMPANY — Delay. — Where a telegram announces sickness of the wife of the sender, in childbirth, with the expression. "Come at once," it was sufficient to require active diligence on the part of the telegraph company in the delivery of the message. —WESTERN UNION TEL. CO. v. LAVENDER, Tex., 40 S. W. Rep. 1035.

100. TENANCY IN COMMON — Farming on Shares. — An agreement for the cultivation of land on shares construed, and held to create the relation of tenants in common in the crops, as between the owner and the occupier of the land; that, in view of all the other terms of the agreement, the only effect that can be given to a provision "that, until division of the crops, the title and possession shall be and remain in the owner of the land," is that he shall hold the same as security for the performance of the contract by the occupier. — STRANGEWAY v. EISENMAN, Minn., 71 N. W. Rep. 617.

101. TENANTS IN COMMON—Rents—Accounting.—A bill will not lie for the mere purpose of settling an account between tenants in common, where one is liable to his cotenants for rents received, and the amount is fixed and certain, and there is no complication or confusion of accounts.—MCCAW v. BARKER, Ala., 22 South. Rep. 131.

102. TOWNS — Defective Streets. — An incorporated town has exclusive control of its streets, and must use ordinary care to keep them in a safe condition for travelers thereon exercising ordinary care.—TOWN OF WORTHINGTON v. MORGAN, Ind., 47 N. E. Rep. 235.

103. TRESPASS — Damages.—The damages for cutting lumber, where cut in good faith, is the value of the logs in the creek where they have been put, less the cost of getting them there.—BOND v. GRIFFIN, Miss., 22 South. Rep. 187.

104. VENDOR'S LIEN—Waiver—Mortgages.—A vendor's lien is waived by taking a mortgage for purchase money.—FIELDS v. DRENNEN, Ala., 22 South. Rep. 114.

105. VENDOR AND PURCHASER — Covenants of Warranty.—It is a defense to an action for breach of covenant of warranty that, through fraud and collusion between plaintiff and another, the land in question, when found subsequent to plaintiff's purchase to be public land, was entered as a homestead for the use of plaintiff, and that his eviction therefrom was only pretended. —FRIX v. MILLER, Ala., 22 South. Rep. 146.

106. WATERS — Obstructing Water Course.—An owner of land has no right to dam a natural water course so as to obstruct the flow of the water, thereby causing it to overflow upon and injure the property of another. —BOOKER v. MCBRIDE, Tex., 40 S. W. Rep. 1031.

107. WILLS—Construction—Life Estate.—Testator devised lands to his son, "to have and to hold during the life of my son, and the life-time of his wife, to have and to hold the same and enjoy all the benefits or profits in any wise accruing from said land during their natural lives," and, at the death of his son and his wife, the land to be sold, and the proceeds equally divided among their children: Held, that the son took only a life estate, notwithstanding that a small charge was made upon the land in favor of his mother.—HENRY v. PITTSBURGH CLAY MANUFG. CO., U. S. C. C. of App., Third Circuit, 80 Fed. Rep. 485.

108. WITNESSES — Competency — Waiver.—Where an administrator is a party, he may waive the incompetency of the opposite party to testify to statements of and transactions with deceased under Rev. St. 1889, § 8918, and he does so by taking the latter's deposition, though it is not used on the trial. — ESS v. GRIFFITH, Mo., 40 S. W. Rep. 930.